No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER LEE DEITER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

Under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), a defendant convicted of violating 18 U.S.C. § 922(g) who has three previous convictions for a serious drug offense or violent felony is subject to a fifteen-year mandatory minimum term of imprisonment.

Mr. Dieter was subject to a 15-year mandatory minimum sentence as a "career criminal" because he had previously pled guilty to aiding and abetting an unarmed bank robbery pursuant to 18 U.S.C. § 2.

The questions presented are:

1) **whether aiding and abetting an unarmed bank robbery, which can be committed with a negligent or reckless mens rea, qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e); and**

2) **whether aiding and abetting unarmed bank robbery, which can be accomplished without the threat of violent force or the intentional threat of violent force, is a "violent felony" justifying an enhanced sentence under the ACCA.**

Other petitions on this Court's docket present similar questions, including *Haight v. United States*, No. 18-370, and *Stokeling v. United States*, No. 17-5554.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Walter Lee Deiter, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

DECISION BELOW

The opinion of the court of appeals (App. A) is reported at 890 F.3d 1203. The Tenth Circuit's Order denying rehearing and rehearing en banc is attached hereto (App. B). The order of the district court denying Mr. Deiter's motion to vacate is unreported but is available at *United States v. Deiter*, No. CIV 15-1181 MV/KBM, 2017 WL 3190653 (D.N.M. July 25, 2017), and attached hereto (App. C).

JURISDICTION

The Tenth Circuit entered judgment in this case on May 24, 2018. A petition for rehearing was filed on July 9, 2018 and the petition was denied on July 23, 2018. This Petition is being filed within 90 days after the Tenth Circuit's Order denying rehearing, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g) provides in pertinent part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> [. . .]

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2) provides in pertinent part:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e) provides in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection--
>
> [. . .]
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

18 U.S.C. § 2 states in pertinent part:

> (a) Whoever 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. § 2113(a) provides in pertinent part:

> (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 . . . .

STATEMENT OF THE CASE

In 2014, Mr. Deiter was convicted of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g) (1). Ordinarily, the maximum sentence for this offense is 10 years. *See* 18 U.S.C. § 924(a)(2). However, the district court judge determined that Mr. Deiter's sentence should be enhanced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), on the basis he had two prior convictions for a "serious drug offense" and one prior conviction for a "violent felony." This conclusion exposed him to a mandatory minimum 15-year sentence, *see* 18 U.S.C. § 924(e)(1), and increased his guideline range from 92-115 months to 210-262 months. Mr. Deiter was sentenced to 180 months.

At the time of Mr. Deiter's sentencing in 2014, an offense was a "violent felony" under the ACCA if it: 1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the force clause), 2) "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated clause); or 3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B).

Following Mr. Deiter's conviction and sentencing, this Court held that the ACCA's residual clause is unconstitutionally vague. *See Johnson v. United States*, 135 S.Ct. 2551 (2015)(*Johnson II*). Using 28 U.S.C. § 2255, Mr. Deiter moved to va-

cate his sentence because it had been imposed under the residual clause. Specifically, Mr. Deiter argued that under *Johnson II*, his prior conviction for aiding and abetting unarmed bank robbery pursuant to 18 U.S.C. §§ 2 & 2113(a) no longer qualified as a violent felony. The district court denied Mr. Deiter's motion, concluding that this prior conviction qualified as a violent felony under the force clause of the ACCA. The Tenth Circuit affirmed.

On appeal, Mr. Deiter argued that aiding and abetting unarmed bank robbery failed to satisfy the force clause because neither aiding and abetting nor unarmed bank robbery required the intentional use, attempted use, or threatened use of violent physical force against a person. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Instead, a defendant may be found guilty of aiding and abetting unarmed bank robbery with merely a negligent or reckless mens rea and without the use of violent force. *See United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996); see also *United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury); *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) ("Whether a particular act constitutes intimidation is viewed objectively, . . . and a defendant can be convicted under [federal bank robbery] even if he did not intend for an act to be intimidating."); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (same).

The Tenth Circuit disagreed. In its opinion, the Tenth Circuit determined that there was no legal distinction between a conviction for aiding and abetting and

unarmed bank robbery. *United States v. Deiter*, 890 F.3d 1203, 1216 (10th Cir. 2018). Therefore, the court addressed whether unarmed bank robbery qualified as a violent felony under the ACCA. *Id.* Citing to *Voisine v. United States*, 136 S. Ct. 2272 (2016), the court first reasoned that crimes requiring a reckless mens rea can categorically involve the use of force, and therefore qualify as a violent felony under the ACCA. *Deiter*, 890 F.3d at 2013. That said, the court stated regardless of the application of *Voisine*, unarmed bank robbery requires more than mere recklessness or negligence and, therefore, qualifies as a violent felony. *Id.* Based on the above analysis, the Tenth Circuit ultimately held "aiding and abetting bank robbery qualifies as a 'violent felony' under the ACCA's elements clause." *Id.*

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Tenth Circuit's decision conflicts with this Court's precedent and adversely impacts numerous prisoners in the United States. Once this Court eliminated the residual clause as the easiest route to an ACCA enhancement in *Johnson II*, lower courts were required to reconsider whether certain crimes, which long counted as "violent felonies" within the residual clause, still qualify as predicate crimes under the ACCA. In doing so, the lower courts were tasked with applying this Court's revised definition of "physical force" as "violent force" found in *Johnson v. United States,* 559 U.S. 133, 141 (2010) (*Johnson I*), to the least culpable conduct criminalized by the statute, as required by *Moncrieffe v. Holder,* 569 U.S. 184 (2013); *Descamps v. United States,* 570 U.S. 254

(2013); and *Mathis v. United States,* 136 S. Ct. 2243 (2016). The lower courts have systematically failed to properly apply this analysis in the case of federal unarmed bank robbery.

In addition, a circuit split has arisen as a result of the lower courts' conflicting interpretations of the interplay between this Court's decisions in *Leocal* and *Voisine*. There is no reason to believe that this conflict will resolve itself; thus, it is time for this Court to step in and provide much needed guidance on the application of the ACCA's force clause to crimes that have no explicit requirement for intentional or violent force to sustain a conviction.

I. The Decision Below Is Wrong; Aiding and Abetting Unarmed Bank Robbery by Intimidation Does Not Require an Intentional Threat of Violent Force.

After this Court's decision in *Leocal,* the courts of appeals uniformly held that an offense with a reckless mens rea does not constitute a "violent felony" under the force clause in the ACCA. *See United States v. Fish*, 758 F.3d 1, 10 & n.4 (1st Cir. 2014) (collection of cases). In other words, "the use of force must be intentional, not just reckless or negligent." *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (holding California bank robbery does not constitute "violent felony" under the ACCA because the offense does not require intentional use of force); *see also United States v. Hernandez-Hernandez*, 817 F.3d 207, 211 (5th Cir. 2016) (explaining, for the identical elements clause in U.S.S.G. §2L1.2, that "if the crime upon which the enhancement is based can be proven without evidence that the defendant *intentionally used force against the person of another*, then the offense does not qualify as a crime of violence" (emphasis added)); *United States v. Armijo*, 651 F.3d

1226, 1234 (10th Cir. 2011) (holding that Colorado manslaughter is not a "crime of violence" under the elements clause in U.S.S.G. §4B1.2 because it has a mens rea of mere recklessness); *cf. United States v. Castleman*, 572 U.S. 157, 1414 n.4, 1414 n.8 (2015) (recognizing that the "Courts of Appeals have almost uniformly held" that "a reckless application of force," or anything less, is "not sufficient" to constitute the "use" of physical force necessary for an offense to qualify as a "crime of violence" under the similar elements clause in 18 U.S.C. § 16 (a)).

However, in *Voisine*, this Court recently held that "misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct trigger the statutory firearms ban" of 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by any person with a prior conviction for a "misdemeanor crime of domestic violence." 136 S.Ct. 2272, 2276 (2016). In *Voisine,* the Supreme Court stated that 18 U.S.C. § 921(a)(33)(A)'s elements clause "naturally read, encompasses acts of force undertaken recklessly—*i.e.*, with conscious disregard of a substantial risk of harm." *Id.* at 2282. The Court reasoned that Congress intended § 922(g)(9) to apply firearms restrictions to some persons who had engaged in reckless conduct, "along with all others, whom the States' ordinary misdemeanor assault laws covered" because "Congress passed § 922(g)(9) to take guns out of the hands of abusers convicted under the misdemeanor assault laws then in general use in the States." *Id.* at 2280-81; *see also id.* at 2275 ("Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns.").

In the wake of *Voisine*, the courts of appeals have divided over whether *Leocal* remains applicable law. The First Circuit has held that an offense with a reckless mens rea is not a "violent felony" for the purposes of the ACCA, and the majority of the panel of the Fourth Circuit endorses that holding in a concurring opinion. *See United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017) (per curiam); *United States v. Middleton*, 833 F.3d 485, 499-500 (4th Cir. 2018) (Floyd, C.J.) (concurring in the judgment) (joined by Harris, C.J.). By contrast, the D.C., Eighth, and Tenth Circuits have held that offenses with a reckless mens rea can qualify as violent felonies under the ACCA. *See United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *United States v. Pam*, 867 F.3d 1191, 1204 (10th Cir. 2017).

Though courts are now split, this Court did "not foreclose the possibility" that "in light of differences in their contexts and purposes," a similar elements clause in a statutory provision defining "violent felony" would not encompass "reckless behavior." *Voisine*, 136 S. Ct. at 2280 n.4. Reckless conduct cannot be sufficient to satisfy the elements clause in the context of ACCA because, as this Court recognized in *Johnson I*, the result would not make sense. While it makes sense that a *firearm prohibition* would apply to someone with a prior conviction for a "misdemeanor crime of domestic violence" involving "an act of force carried out in conscious disregard of its substantial risk of causing harm," *Voisine*, 136 S.Ct. at 2279, it makes no sense that the ACCA would classify the exact same conduct as a "violent felony" and thereby subject the person to much harsher *penalties*. *See United States v. Sabetta*, 221 F.Supp.3d 210, 223 (D.R.I. 2016). ("Congress was certainly not targeting crimes

that require only a recklessness mens rea in crafting the ACCA, and plenty of predicate crimes still qualify as violent felonies in every state, even though recklessness is insufficient under the [elements] clause."); *see also Taylor v. United States*, 495 U.S. 575, 582 (1990) ("[I]n terms of fundamental fairness, the [ACCA] should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases."). Thus, *Voisine* does nothing to undercut the requirement that, to qualify as a violent felony, the force must be intentional.

Indeed, if *Voisine*'s interpretation of "use" is applied to ACCA, three past convictions for injuries that result from reckless plate throwing (the example discussed at length in *Voisine*), or reckless driving, could be sufficient to earn a designation as an "armed career criminal." Labeling a thrice-convicted "Angry Plate Thrower" or "Reckless Policeman" as an "Armed Career Criminal" would appear to be the type of "comical misfit" this Court has previously indicated must be avoided when interpreting 18 U.S.C. § 924(e)(2)(B). *Voisine*, 136 S.Ct. at 2286-87; *see also United States v. Bennett*, Nos. 1:16-cv-251-GZS, 1:94-cr-11-GZS, 2016 WL 3676145, at *3 (D. Me. July 6, 2016).

The different context and purpose of the sentencing enhancements in the ACCA on the one hand, and the statutory firearms ban on the other, render *Voisine*'s inclusion of reckless force within the scope of § 921(a)(33)(A)(i) immaterial to whether such force falls within the scope of § 924(e)(2)(B)(i). And, "[w]hen a person purposely creates force and recklessly applies it, that person cannot categorical-

ly be said to attempt, or threaten, or actually use force against the person of another, as required by [§ 924(e)(2)(B)(i)]." *Sabetta*, 221 F.Supp.3d 210, 223 (holding that "Rhode Island's assault with a dangerous weapon, is not categorically a violent felony under the ACCA" because it "requires proof of a mens rea of only recklessness").

Turning to the case at bar, there is no dispute that neither 18 U.S.C § 2 nor 18 U.S.C. § 2113(a) have an explicit mens rea requirement. A person violates 18 U.S.C. § 2113(a) if he, "by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another" the property of the bank. This means that "intimidation" is satisfied under the bank robbery statute whether or not the defendant actually intended the intimidation, as long as an ordinary person in the victim's position reasonably could infer a threat of bodily harm from the defendant's acts. *See Kelley*, 412 F.3d at 1244. Moreover, placing a person in fear of bodily harm does not necessarily require the use of violent *physical* force. *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012); *see also Rummel v. Estelle*, 445 U.S. 263, 307 at n.27 (1980) ("Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison, was not.").

Likewise, there is also no dispute that these crimes are general intent crimes. *See Carter v. United States*, 530 U.S. 255, 268 (2000) (holding that § 2113(a) requires "proof of *general intent*"); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (stating a defendant can be properly convicted as a principal under § 2 even when he has not personally "commit[ed] all the acts constituting the ele-

ments of the substantive crime aided."); *United States v. Garrett*, 720 F.2d 705, 713–14 (D.C. Cir. 1983) ("To sustain [an aiding and abetting] conviction, all that is necessary is to show some affirmative participation which *at least* encourages the principal offender to commit the offense, with all its elements, as proscribed by the statute.") (quotation and original alteration marks omitted) (emphasis added). *See also United States v. Lyons*, 740 F.3d 702, 715 (1st Cir. 2014) ("[A] culpable aider and abettor need not perform the subject offense, be present when it is performed, or be aware of the details of its execution."); *United States v. Francomano*, 554 F.2d 483, 487 (1st Cir. 1977) ("Doubtless the intimacy of association . . . is a factor which, with others, could rather quickly add up to circumstantial proof of guilty knowledge . . ."); *United States v. Martinez,* 479 F.2d 824, 829 (1st Cir. 1973) ("[T]here are circumstances where presence itself implies participation."); *United States v. King*, 373 F.2d 813, 815 (2d Cir. 1967) ("[T]here may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought 'by his action to make it succeed'") (internal citation omitted); *United States v. Yero,* 694 F. Supp. 895 (S.D. Fla. 1988) (upholding a conviction for aiding and abetting where the defendant was never present at the scene of the crime, but unknowingly provided vehicles with which robberies were committed and, upon learning that the cars were involved in armored car robberies, demanded and received more money than he had previously been given); *United States v. Perez,* 922 F.2d 782, 785 (11th Cir. 1991) (upholding a conviction for aiding and abetting where the defendant was

never present at the scene of the crime, but provided the car which was later driven by the perpetrators of a bank robbery).

With respect to § 2, it is abundantly clear that a defendant need not participate in every aspect of a crime to be liable as an aider and abettor. Therefore, under federal law, a jury can convict a defendant of aiding and abetting unarmed bank robbery without proof that the defendant committed an act directed toward taking bank property by means of actual or threatened force, or violence, or fear of injury to a person. As such, Mr. Deiter's conviction under § 2 cannot qualify as a crime of violence under the ACCA's force clause, and could only be counted as a predicate crime pursuant to the now-defunct residual clause.

Even assuming that Mr. Deiter's conviction for aiding and abetting unarmed bank robbery is equivalent to a conviction under § 2113(a), the conclusion remains the same. "Intimidation" is satisfied under the bank robbery statute "whether or not the defendant actually intended the intimidation," as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996); *see also Yockel*, 320 F.3d at 821; *Kelley*, 412 F.3d at 1244; *Foppe*, 993 F.2d at 1451.

In other words, a defendant may be found guilty of federal bank robbery even though he did not intend to put another in fear of injury. It is enough that the victim reasonably fears injury from the defendant's actions—whether or not the defendant actually intended to create that fear. This interpretation makes sense because a defendant who does not *intend* for an act to be intimidating does not *know*

that his acts are objectively intimidating. Rather, it makes more sense that the defendant's knowledge is immaterial: if his actions are "objectively intimidating," whether he meant them to be does not matter.

Thus, under § 2113(a), while a defendant must intend the *act* itself, there is no requirement that he intend that his act *threaten the use of force.* Indeed, this Court has adopted this more commonsense understanding. In *Carter*, this Court held that bank robbery requires "proof of general intent," which means that the "defendant possessed knowledge with respect to the *actus reus* of the crime," 530 U.S. at 268. For a bank robbery, this is the taking of money from a bank through an act that a victim perceives as intimidating.

Likewise, this Court's decision in *Elonis v. United States*, 135 S.Ct. 2001 (2015), is also instructive. There, the Court explained *Carter* and distinguished the "general intent" that satisfies § 2113(a) from an intentional threat. *Id.* at 2010. This Court wrote, "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'" *Id.* (quoting *Carter*, 530 U.S. at 269 (internal quotation marks omitted)). What this means, *Elonis* made clear, was that § 2113(a) requires only that the defendant "*act* knowingly" as to the "forceful taking" or taking by intimidation. *Id.* That is, to find a defendant guilty of bank robbery by intimidation, a jury needs only to determine that a defendant consciously took money from a bank in a way that would make an ordinary person afraid. The jury does not need to determine whether the defendant inten-

tionally threatened physical harm in order to cause fear in a particular person. Thus, the "requirement that a defendant *act* knowingly is itself an adequate safeguard" to separate wrongful conduct from otherwise innocent conduct under § 2113(a). *Id.*

Because the "intimidation" element of bank robbery can be committed with mere negligence, it fails to qualify as a violent felony. The Tenth Circuit's application of *Voisine* was inappropriate and its characterization of the mens rea requirement for § 2113(a) in the case at bar was incorrect and misapplied this Court's precedent.

II. A Threat of Harm is Not a Threat of Violent Force.

Likewise, neither 18 U.S.C § 2 nor 18 U.S.C. § 2113(a) require the use of "violent force." This Court set forth the controlling definition of "physical force" in *Johnson I.* There, this Court addressed whether a violation of Florida's battery statute satisfied the "physical force" clause. That statute required only intentional physical contact, no matter how slight. *Id.* at 138. The Court held such a minimal touching did not constitute "physical force" under Section 924(e)(2)(B)(i). *Id.* at 145. The Court went on to explain, "physical force" in the context of a ACCA "violent felony," means "violent force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140-45. Ultimately, the Court found that the statute's requirement of the slightest physical contact did not come near to matching that definition.

It is well settled that the "intimidation" necessary for a conviction under the federal bank robbery statute occurs when "an ordinary person in the [victim's posi-

tion] reasonably could infer a threat of *bodily harm* from the defendant's acts." *Woodrup*, 86 F.3d at 364 (emphasis added); *see also United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010) (same); *Kelley*, 412 F.3d at 1244 (same); *Yockel*, 320 F.3d at 824 (same); *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) (same). Thus, the statutory language of § 2113(a) does not require that any particular quantum of force be used, attempted or threatened. Indeed, convictions for violating this statute have been upheld where no force or violence occurred or was even explicitly threatened. *See, e.g., United States v. Slater*, 692 F.2d 107 (10th Cir. 1982) (upholding bank robbery conviction where "the surprise and fear of bank personnel" allowed the defendant to walk behind the counter and remove the cash despite making no demand or threat whatsoever); *Kelley,* 412 F.3d at 1244-45 (finding sufficient evidence of intimidation despite the fact that the defendant did not display a gun or note and made no demand of any kind).

By its plain language, proof that a defendant's acts caused a victim to "infer a threat of bodily harm" is not the same as proof that the defendant used, attempted to use, or threatened to use any *violent*, physical force. Indeed, bank robbery convictions have been supported by evidence that the defendants waited for a teller to walk away, jumped up on the counter in front of her unlocked cash drawer, took money from the drawer, and ran away. *Kelley*, 412 F.3d at 1243.

Bank robbery convictions have also been upheld where a defendant told tellers to "put the money in the bag," but did not have or suggest that he had any weapon, and did not threaten the tellers in any way. *See Higdon*, 832 F.3d at 313.

Even a defendant's appearance, coupled with statements such as "[i]f you want to go heaven, you'll give me the money," have been sufficient to uphold a bank robbery conviction where the defendant made no threatening movements and did not claim to have a weapon. *Yockel*, 320 F.3d at 820-21. While an ordinary person may infer a threat of bodily harm from these acts, the acts clearly do not use, attempt to use, or threaten the use of *violent physical force* as required under the elements clause.

Similarly, simply placing a person in fear of bodily harm does not necessarily require the use of violent *physical* force. For example, a person could commit bank robbery through intimidation by threatening to poison the teller, but this would not constitute the threatened use of violent physical force, even though it would place the teller in fear of bodily harm. *Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012); *see also Rummel*, 445 U.S. at 282 n.27.

Thus, even though § 2113(a)'s "by force and violence, or by intimidation" is construed as requiring that the victim have feared bodily injury, a fear of bodily injury is not the same as an element requiring proof that the defendant used, attempted to use, or threatened the use of physical violent force. In sum, the threat of harm, coupled with the lack of an intentional threat of force, renders federal bank robbery under § 2113(a) categorically overbroad and does not qualify as a violent felony under the ACCA.

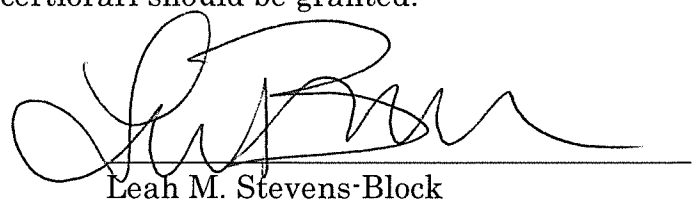
III. This Case Presents a Recurring, Important Issue that Warrants This Court's Review.

The questions presented are ones that occur frequently and are of national importance. Since 2016, over 11,400 defendants have been convicted of violating 18 U.S.C. § 922(g), and over 560 of these defendants were sentenced pursuant to the ACCA. *See* U.S. Sentencing Comm'n, Quick Facts, Felon in Possession of a Firearm, Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research and publications/quickfacts/Felon_in_Possession_FY16.pdf ; U.S. Sentencing Comm'n, Quick Facts, Felon in Possession of a Firearm, Fiscal Year 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick facts/Felon_in_Possession_FY17.pdf. It is not possible to determine how many ACCA sentences are based on offenses with a reckless mens rea, but in the years since this Court decided *Voisine*, at least five courts of appeals and nine district courts have addressed the question directly. It is clear that the questions presented herein arise frequently and have grave consequences to those inmates that are subject to sentencing enhancements under the ACCA. The ACCA substantially enhances sentences a defendant is eligible to review, including raising the possibility of life imprisonment where it would otherwise not exist. As it stands, defendants across the country are receiving substantially different sentences for almost identical conduct based on where the conduct arises and the circuit's interpretation of the force clause. These discrepancies are unfair and unwarranted. This Court has previously recognized that applying the ACCA uniformly is a matter of national importance.

See Taylor, 495 U.S. at 582. The need for uniformity further demonstrates that a grant of certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.



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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WALTER LEE DEITER,

Defendant - Appellant.

No. 17-2159

Appeal from the United States District Court
for the District of New Mexico
(D.C. Nos. 1:15-CV-01181-MV-KBM & 1:10-CR-00622-MV-1)

Submitted on the briefs:*

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Before **PHILLIPS**, **McKAY**, and **O'BRIEN**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

O'BRIEN, Circuit Judge.

This case raises a run-of-the-mill ineffective assistance of counsel claim. It also presents an interesting *Johnson II* claim—whether aiding and abetting (18 U.S.C. § 2) federal bank robbery (18 U.S.C. § 2113(a)) qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA). *See Johnson v. United States (Johnson II)*, --- U.S. ---, 135 S. Ct. 2551 (2015).

I. Background

On November 12, 2009, at 12:38 a.m., police officers from the Albuquerque, New Mexico, Police Department were dispatched to an apartment complex to investigate a 911 domestic violence call. Upon their arrival, they saw Walter Lee Deiter and his wife, D'Leah Harris, in the middle of the street. When Deiter and Harris saw the officers, they separated, each walking in the opposite direction. Deiter proceeded toward the apartment complex; Officer Patricia Whelan followed him. When Deiter went behind a staircase, Whelan temporarily lost sight of him; he emerged a few minutes later on the second-story open breezeway.

Whelan told Deiter to come down and talk to her. He refused and appeared "nervous[,] . . . looking kind of up and down the breezeway of the second floor." (R. Vol. 2 at 199.) When she again told him to come down, he complied. But before doing so, he made a "squatting, bending motion" which led Whelan to believe he had "dropped" something illegal. (*Id.* at 201, 206.) She could not see what was dropped because a three- to four-foot tall wall obstructed her view.

Once Deiter came down the stairs, Whelan asked Officer Sammy Marquez to determine what had been dropped. As Marquez proceeded up the steps to the second-story breezeway, Deiter took off running. Whelan and Officer Glenn St. Ong chased him. St. Ong brought him to the ground with his taser. Marquez arrived and held his legs down while Whelan handcuffed him. Once he was secured, Marquez went to where Deiter was seen on the second-story breezeway; on the floor he found a holster containing a loaded .22 caliber revolver. Forensic testing revealed Deiter's DNA on both the holster and firearm. The firearm also contained a small amount of DNA from an unidentified source.

A jury convicted Deiter of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). That offense normally carries with it a maximum sentence of 10 years imprisonment. *See* 18 U.S.C. § 924(a)(2). The district judge, however, concluded the ACCA applied because Deiter had two prior convictions for a "serious drug offense" and one prior conviction for a "violent felony." *See* 18 U.S.C. § 924(e). Relevant here, she concluded his 1988 conviction for aiding and abetting bank robbery in violation of 18 U.S.C. §§ 2113(a) and 2 constituted a "violent felony." This conclusion exposed him to a mandatory minimum 15-year sentence (180 months), *see* 18 U.S.C. § 924(e)(1), and increased his guideline range from 92-115 months to 210-262 months. The judge sentenced him to 180 months. We affirmed on direct appeal. *See United States v. Deiter*, 576 F. App'x 814 (10th Cir. 2014) (unpublished).

At the time of Deiter's sentencing in January 2014, an offense was a "violent felony" under the ACCA if it (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause), (2) "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated offense clause), or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B). On June 26, 2015, the United States Supreme Court decided the residual clause is unconstitutionally vague. *Johnson II*, 135 S. Ct. at 2557, 2563. It left intact, however, the elements and enumerated offense clauses. *Id.* at 2563. On April 18, 2016, it made *Johnson II*'s holding retroactive to cases on collateral review. *Welch v. United States*, --- U.S. ---, 136 S. Ct. 1257, 1265 (2016).

Relying on *Johnson II*, Deiter filed a 28 U.S.C. § 2255 motion, claiming his prior bank robbery conviction could not be deemed a "violent felony" supporting the ACCA enhancement. He also argued trial counsel was ineffective for (1) failing to challenge his ACCA sentence and (2) reading a transcript of Whelan's belt tape recorder to the jury which contained an incriminating statement from a witness.

The judge denied the motion. She decided any error in counsel's decision to read the transcript to the jury was not prejudicial in light of the overwhelming evidence against him. She also concluded Deiter's prior bank robbery conviction qualified as a

"violent felony" under the elements clause of the ACCA.[1] She did, however, grant a certificate of appealability (COA).

II. Discussion

A. *Ineffective Assistance of Counsel*

After Deiter was arrested, Whelan canvassed the apartment complex for witnesses. While doing so, she activated the tape recorder on her belt. The recorder captured the following exchange with an unidentified resident at the apartment complex:

> WITNESS: I was sitting on my bed watching a movie and I didn't open the door or anything. I looked in the -- I just heard him yelling and I looked out the peep hole and he was yelling at her (inaudible) and all this other stuff *and he had a gun at this point*. I didn't go outside or anything. I didn't want to get involved.
>
> OFFICER [WHELAN]: Yeah. All you heard was yelling then?
>
> WITNESS: Yeah, really loud.
>
> OFFICER: Did you hear any specific words of what was being said?
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> WITNESS: He said something about, you know, (inaudible) her up and making sure she was okay or something like that. I couldn't really understand what he said because they were upstairs.
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> OFFICER: Yeah.
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> WITNESS: So I don't really know anything expect they were yelling and I was laying here trying to go to sleep and they woke me up.

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[1] The judge did not specifically address Deiter's ineffective assistance of counsel claim based on trial counsel's failure to challenge his ACCA sentence. As we will explain, *see supra* note 4, her decision that his prior bank robbery conviction constitutes a "violent felony" under the ACCA's elements clause demonstrates any *Johnson II* error at sentencing was harmless. Deiter cannot show he was prejudiced by counsel's performance. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

OFFICER: Okay. Did anybody get hit, anything like that?

WITNESS: No. I just saw him. He went upstairs and then (inaudible).

OFFICER: Okay. Crazy night in your apartment building.

(D. Ct. Doc. 143-4 at 9-10 (emphasis added).)

Prior to trial, Deiter moved to exclude the transcript of this exchange, arguing the witness' statements were hearsay and he could not cross-examine the witness because her identity was unknown. The government did not oppose the motion. The judge agreed with the parties but decided the transcript could be used, if necessary, for impeachment purposes.

During cross-examination, defense counsel asked Whelan whether she recalled speaking to a witness who had observed something that night. When Whelan responded no, counsel sought to refresh her recollection with the belt tape transcript. After counsel clarified that he did not seek to admit the transcript into evidence, the judge permitted him to read the transcript to the jury. Counsel did so and then inquired whether Whelan had asked the witness for a name or address. Whelan admitted the transcript did not reveal such a request.

Deiter says defense counsel's decision to read the transcript to the jury amounted to ineffective assistance of counsel.[2] According to him, there was no need to read it to

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[2] It appears this claim is untimely. Defendants generally have one year from the date their convictions become final to file a § 2255 motion. *See* 28 U.S.C. § 2255(f)(1). We affirmed Deiter's conviction and sentence on August 19, 2014. Therefore, his conviction became final on November 17, 2014, when his time to file a writ of certiorari

refresh Whelan's memory or to attack the quality of her investigation; defense counsel could have refreshed her memory by providing her with a copy of the transcript. Counsel's poor choice, Deiter claims, was not only unnecessary, but prejudicial, because the transcript was the only evidence from any witness that positively placed a man, presumably Deiter, in possession of a firearm at the scene. Had counsel not read the transcript to the jury, it would never have been privy to the information contained therein as both parties had agreed not to rely on the transcript.

Ineffective assistance of counsel requires two showings: (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. We assess the reasonableness of counsel's performance in light of "the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Our review is "highly deferential," because "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90.

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expired. *See* Sup. Ct. R. 13(1); *Clay v. United States*, 537 U.S. 522, 525 (2003). He had one year from that date, or until November 17, 2015, to file his § 2255 motion. He did not file it until December 10, 2015, in conjunction with the *Johnson II* claim. The *Johnson II* case may save the timeliness of his ACCA claims, *see United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017), but it does not breathe new life into his ineffective assistance of counsel claim relating to the reading of the belt-tape transcript at trial. Nevertheless, because the government has not raised timeliness as a defense, we address the claim on its merits. *See United States v. Miller*, 868 F.3d 1182, 1185-86 (10th Cir. 2017) (declining to consider government's timeliness argument raised for the first time in a Fed. R. App. P. 28(j) letter).

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The focus of the inquiry is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *see also Strickland*, 466 U.S. at 687 (the prejudice prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

The judge did not reach the reasonableness of defense counsel's actions because Deiter suffered no prejudice:

> While Mr. Deiter insists that the transcript provided the only direct evidence that placed the firearm in his hand, the Court cannot say that but for [defense counsel's] reading of this transcript the result of his jury trial would have been any different. *See Ellis v. Raemisch*, 856 F.3d 766 (10th Cir. 2017). While Officer Whelan did not testify to having an unobscured view of Mr. Deiter holding the firearm, she *did* testify that she saw him squat behind the wall in the same location where the firearm was ultimately found. Indeed, Mr. Deiter's conduct led her to dispatch a fellow officer to determine what Mr. Deiter had left behind the wall. [And] both the firearm and the holster recovered from the breezeway contained Mr. Deiter's DNA, and the holster contained *only* Mr. Deiter's DNA.
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> Although the Court . . . questions whether [defense counsel's decision] to read aloud the belt tape transcript was the most productive strategy, in light of the other evidence presented against Mr. Deiter it is unwilling to say that the decision "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

(R. Vol. 1 at 149-50.) We agree.

The evidence of possession (the only disputed element) was overwhelming:

Whelan saw Deiter squat down and drop something on the floor of the second-story breezeway; the holster and firearm were later found at that location; Deiter ran from the police when Marquez went looking for what he had dropped; and he was the major contributor of the DNA found on the firearm and the only contributor of the DNA found on the holster. Like the trial judge, we are confident the jury would have reached the same result despite any assumed deficiency in counsel's performance.

Deiter relies on *Freeman v. Leapley*, 519 N.W.2d 615 (S.D. 1994), but it does not help him. Freeman was charged with grand theft of an automobile. *Id.* at 616. At trial, defense counsel offered into evidence a police report containing the hearsay statement of a witness inculpating Freeman in the offense. *Id.* at 618. While defense counsel apparently introduced the statement to show the police did not undertake a thorough investigation, the court questioned the reasonableness of that decision because counsel could have accomplished the same goal without admitting the statement. *Id.* Nevertheless, the court found Freeman had not been prejudiced by any deficient performance because the evidence against him was overwhelming. *Id.* at 618-19. So, too, in this case. Even if counsel's performance was deficient,[3] Deiter, like Freeman, has not shown prejudice.

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[3] We don't see this case as substantially similar to *Freeman*, where the witness explicitly named Freeman as the car thief. In this case, the witness merely reported seeing a man with a gun. Because she did not name names, defense counsel reasonably used that statement, as well as Whelan's lack of follow-up investigation, to suggest to the jury that the man the witness saw was not Deiter. While we need not weigh in on the reasonableness of counsel's performance, it appears counsel's decision to read the

B. *ACCA Sentence*

Our review is de novo. *United States v. Ridens*, 792 F.3d 1270, 1272 (10th Cir. 2015). In the district court, Deiter claimed the judge improperly used his prior conviction of aiding and abetting a bank robbery as a qualifying offense under the residual clause of the ACCA. Basing an enhanced sentence on the residual clause would be a constitutional error under *Johnson II*'s pronouncements. Whether the residual clause was the *raison d'etre* for sentencing was intentionally left unaddressed by the judge because his prior conviction qualifies as a "violent felony" under the elements clause. Assuming error, it would have no legal significance (it was harmless as a matter of law) because, as the judge decided and as we now explain, aiding and abetting bank robbery qualifies as a "violent felony" under the ACCA's elements clause.[4] That disposes of Deiter's only

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transcript to the jury was part of a "sound trial strategy." *See Strickland*, 466 U.S. at 689 (quotation marks omitted). Given the evidence against Deiter, defense counsel's strategy was not to conclusively show Deiter did not possess the firearm but rather to plant reasonable doubt in the minds of the jurors as to whether he did so. To that end, he called a DNA expert who testified that "secondary transfer" of DNA may explain the presence of Deiter's DNA on the firearm and holster. Under that theory, Whelan and Marquez obtained Deiter's DNA on their hands when they handcuffed him and transferred his DNA, as well as his or her own (the unidentified DNA), to the holster and firearm when they touched those items. He also sought to undermine the thoroughness of Whelan's investigation by reading the belt tape transcript to her and having her admit she did not ask the witness for a description of the man with the gun. Later, during closing argument, he told the jury that a witness had seen a man with a gun but Whelan never bothered to ask the witness to describe the man or ask the witness when she observed the events, thereby suggesting another man left the gun on the second-story breezeway at a previous time. While the strategy was far-fetched (given the other evidence) and ultimately proved to be unsuccessful, we cannot say it was unreasonable, especially in light of the deference we afford counsel's performance. *Id.*

[4] We entertain no doubt, grave or otherwise, as to the effect of the claimed constitutional error, *see O'Neal v. McAninch*, 513 U.S. 432, 435 (1995); it is harmless.

contested argument in this appeal.

An offense satisfies the elements clause of the ACCA if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court has defined "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States (Johnson I)*, 559 U.S. 133, 140 (2010). In deciding whether a prior conviction constitutes a "violent felony" under the elements clause, "we apply the categorical approach, focusing on the elements of the crime of conviction, not the underlying facts." *United States v. Harris*, 844 F.3d 1260, 1263 (10th Cir. 2017). That approach constrains our review. *See Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction rested upon nothing more than the least of the acts criminalized . . . ." (quotation marks omitted)); *see also Harris*, 844 F.3d at 1268 n.9 ("In applying the categorical approach, the Supreme Court has instructed us to identify the least culpable conduct criminalized by the state statute."). We now proceed to do so.

18 U.S.C. § 2113(a) provides in relevant part:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, . . . 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 . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.[5]

[5] Section 2113(a) also prohibits (1) "obtain[ing] or attempt[ing] to obtain by

Deiter argues § 2113(a) is not a "violent felony" under the ACCA's elements clause because it includes bank robbery by intimidation, which does not satisfy the

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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" and (2) "enter[ing] or attempt[ing] to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . or any larceny." Deiter has never relied on the latter. Nor did he raise the former in the district court. In this appeal (for the very first time), he argues "by force and violence," "by intimidation" and "by extortion" are not separate elements but rather three separate means of committing the single crime of bank robbery. *See Mathis v. United States*, --- U.S. ---, 136 S. Ct. 2243 (2016). Relying on that premise, he says neither bank robbery by intimidation nor bank robbery by extortion satisfies the elements clause. The government points out that Deiter did not raise his means versus elements or bank robbery by extortion arguments in the district court, restricting our review of them to plain error. His problems are more fundamental; he has waived appellate review of those arguments altogether.

He did not raise those arguments in the district court (even though *Mathis* was decided early on in those proceedings) and has not requested plain error review on appeal, either in his opening or reply brief, which "'surely marks the end of the road for an argument for reversal not first presented to the district court.'" *United States v. Lamirand*, 669 F.3d 1091, 1098 n.7 (10th Cir. 2012) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011)); *cf. United States v. Courtney*, 816 F.3d 681, 684 (10th Cir. 2016) (reviewing argument for plain error in criminal appeal where appellant "argued plain error fully in his reply brief"). Not only that, he did not object to the magistrate judge's report and recommendation in which she concluded that § 2113(a)'s alternatives—"by force and violence or by intimidation" and "by extortion"—are elements. As such, she applied the modified categorical approach to determine which alternative element formed the basis of Deiter's underlying conviction. Looking to the indictment, she found it "clear that he was convicted of federal bank robbery 'by force, violence, and intimidation' and not of bank robbery by extortion." (R. Vol. 1 at 120.) We have "adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions." *See Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005). While we have recognized two exceptions to this rule, neither applies here because Deiter was and is represented by counsel, he was informed of the time period for objecting and the consequences of not doing so, and he has not attempted to show the interests of justice require review. *Id.* (the firm waiver rule does not apply "when (1) a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object, or when (2) the interests of justice require review" (quotation marks omitted)). Due to the waiver, we need not address the elements versus means conundrum.

violence test. According to him, the elements clause requires the intentional use, attempted use, or threatened use of physical force against a person. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Section 2113(a), on the other hand, is a general intent crime requiring only that the defendant know he was physically taking the money (the *actus reus*), not that he intended to intimidate. Indeed, whether an act is intimidating depends on whether the victim reasonably feared injury from the defendant's actions. Therefore, Deiter posits, a defendant can be convicted of bank robbery even if he did not intend for an act to be intimidating; in other words, a conviction can rest simply on reckless or negligent conduct, which is not enough.[6] *See United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008). He faces a substantial headwind.

We recently decided that federal bank robbery by intimidation categorically "has as an element the use, attempted use, or threatened use of physical force" because intimidation involves the threatened use of physical force against the person of another. *See United States v. McCranie*, 889 F.3d 677, No. 17-1058, 2018 WL 2050093, at *3-4 (10th Cir. May 3, 2018); *see also United States v. Ybarra*, --- F. App'x ---, No. 17-2131, 2018 WL 1750547, at *3-4 (10th Cir. Apr. 12, 2018) (unpublished); *United States v.*

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[6] The Supreme Court recently granted certiorari review in *Stokeling v. United States* (S. Ct. No. 17-5554), to decide whether the Florida robbery statute, Fla. Stat. Ann. § 812.13, satisfies the ACCA's elements clause. More specifically, the Court will decide whether a state law's robbery statute which requires the defendant to overcome the victim's resistance is categorically a "violent felony" under the ACCA's elements clause if that state's law requires only slight force to overcome that resistance. Deiter makes no argument regarding the level of force necessary to commit federal bank robbery. Accordingly, we decline to hold this case in abeyance until *Stokeling* is decided.

Higley, --- F. App'x ---, No. 17-1111, 2018 WL 1252093, at *2 (10th Cir. Mar. 9, 2018) (unpublished); *United States v. McGuire*, 678 F. App'x 643, 645-46 (10th Cir. 2017) (unpublished).[7] These decisions align with every circuit to have addressed the issue.[8] Deiter's *mens rea* argument is unconvincing.

First, his reliance on *Zuniga-Soto* is misplaced. There, we held that a crime requiring a *mens rea* of recklessness does not qualify as a "crime of violence" under USSG's § 2L1.2's elements clause. 527 F.3d at 1124. However, we have since recognized the Supreme Court's decision in *Voisine v. United States*, --- U.S. ---, 136 S. Ct. 2272 (2016). *See United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017). "A statute requiring proof only that the defendant acted willfully and with reckless disregard for the risk posed by that act to another person may categorically involve the use of physical force" under the ACCA.[9] *Id.*

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[7] *Higley* and *McGuire* addressed whether bank robbery by intimidation constitutes a "crime of violence" under the elements clauses of 18 U.S.C. § 924(c)(3)(A) and USSG § 4B1.2, respectively. However, those clauses are nearly identical to the ACCA's elements clause and Deiter does not provide any reason for treating them differently.

[8] *See United States v. Ellison*, 866 F.3d 32, 36-37 (1st Cir. 2017); *United States v. Wilson*, 880 F.3d 80, 84-85 (3d Cir. 2018); *United States v. McNeal*, 818 F.3d 141, 153-54 (4th Cir. 2016); *United States v. Brewer*, 848 F.3d 711, 715-16 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293, 295-96 (6th Cir. 2016); *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017); *United States v. Harper*, 869 F.3d 624, 625-27 (8th Cir. 2017); *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018); *In re Sams*, 830 F.3d 1234, 1238-39 (11th Cir. 2016).

[9] *Zuniga-Soto* involved the elements clause of § 2L1.2, not that of the ACCA. For that reason, *Pam*, an ACCA case, expressly declined to decide whether *Voisine* had overruled *Zuniga-Soto*. *See Pam*, 867 F.3d at 1207 n.15. Nevertheless, a panel of this Court has applied the reasoning of *Pam* to the elements clause of USSG § 4B1.2 because it is identical to that of the ACCA and the defendant had not provided any basis for

In any event, § 2113(a) requires more than mere recklessness or negligence, *see Leocal*, 543 U.S. at 9 ("[T]he use of physical force against the person or property of another . . . most naturally suggests a higher degree of intent than negligent or merely accidental conduct") (quotation marks omitted); it "requir[es] proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation)." *See Carter v. United States*, 530 U.S. 255, 268 (2000). Relying on *Carter*, other circuits have held that to be convicted of bank robbery by intimidation, the defendant must have at least known his actions were objectively intimidating.[10] Our case law and pattern criminal jury instruction support this conclusion. *See McCranie*, 2018 WL 2050093, at *3 ("[E]very definition of intimidation requires *a purposeful act* that instills objectively reasonable fear (or expectation) of force or bodily injury." (emphasis added)); *United States v. Mitchell*, 113 F.3d 1528, 1531 (10th Cir. 1997) ("In determining whether the evidence is sufficient to support a finding of intimidation in the context of a bank robbery, we look to three factors: (1) whether the situation appeared dangerous, (2) *whether the defendant intended to intimidate*, and (3) whether the bank personnel were reasonable in their fear of death or injury." (emphasis added)); *Ybarra*, 2018 WL 1750547, at *3 ("[I]ntimidation under the federal bank-robbery statute could exist only if

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treating them differently. *See United States v. Sarracino*, --- F. App'x ---, No. 17-2168, 2018 WL 1252095, at *2 n.3 (Mar. 9, 2018) (unpublished).

[10] *See Ellison*, 866 F.3d at 38-39; *Wilson*, 880 F.3d at 85-88; *McNeal*, 818 F.3d at 155-56; *McBride*, 826 F.3d at 296; *Campbell*, 865 F.3d at 856-57; *Watson*, 881 F.3d at 785; *United States v. Horsting*, 678 F. App'x 947, 949-50 (11th Cir. 2017) (unpublished).

the defendant had *intentionally acted in a way that would cause a person of ordinary sensibilities to fear bodily harm*." (emphasis added) (quotation marks omitted)); 10th Cir. Pattern Jury Instruction 2.77 ("[A] taking would not be by 'means of intimidation' if the fear, if any, resulted from the alleged victim's own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking of money or property accompanied *by intentional, intimidating behavior on the part of the defendant*." (emphasis added)).[11]

Deiter resists this result, saying his case is different because he pled guilty to aiding and abetting federal bank robbery. According to him, aiding and abetting under 18 U.S.C. § 2 must be analyzed separately from the underlying crime and is not a categorical "violent felony" because § 2 does not have as an element the use, attempted use, or threatened use of physical force. He analogizes aiding and abetting to conspiracy and attempt crimes, both of which this Court has decided are generally not violent felonies because they criminalize mere preparatory conduct. *See United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010); *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007). We are not persuaded.

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[11] Deiter claims our case law and pattern jury instruction are not relevant because his underlying conviction occurred in the Southern District of Florida and, as a result, Eleventh Circuit law controls. Yet, as we explain below, *see supra* note 12, he tries to avoid Eleventh Circuit law when it is unfavorable to him. He cannot have it both ways. Nevertheless, the Eleventh Circuit has rejected his arguments. *See Horsting*, 678 F. App'x at 949-50.

18 U.S.C. § 2 provides in relevant part: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." "[U]nder § 2 those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Rosemond v. United States*, --- U.S. ---, 134 S. Ct. 1240, 1245 (2014) (quotation marks omitted). "[A] person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission," i.e., "with full knowledge of the circumstances constituting the charged offense." *Id.* at 1245, 1248-49; *see also Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) ("[T]o aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." (quotation marks omitted)); *United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013) (for an aiding and abetting conviction, the government must prove the defendant "shared in the intent to commit the underlying offense, willfully associated with the criminal venture, and aided the venture through affirmative action" (quotation marks omitted)). "Mere presence at a crime scene or knowledge alone that a crime is being committed is insufficient." *Rosalez*, 711 F.3d at 1205 (quotation marks omitted). "[A] defendant must share in the intent to commit the underlying offense." *Id.* (quotation marks omitted).

That being said, "it is well established that aiding and abetting is not an independent crime under 18 U.S.C. § 2; it simply abolishes the common-law distinction between principal and accessory." *United States v. Cooper*, 375 F.3d 1041, 1049 (10th Cir. 2004) (quotation marks omitted). This legal principle led the Supreme Court to conclude that a prior conviction for vehicle theft under Cal. Veh. Code Ann. § 10851(a) was categorically a "theft offense" under the Immigration and Nationality Act even though the California statute also prohibited aiding and abetting the theft. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007).

The generic definition of "theft offense" is the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id.* at 189 (quotation marks omitted). The Ninth Circuit decided the California statute swept more broadly than the generic definition because it permitted conviction for aiding and abetting a theft. *Id.* at 188. It reasoned "one might 'aid' or 'abet' a theft without taking or controlling property" and therefore not satisfy the generic definition. *Id.* The Supreme Court rejected its reasoning:

> Since criminal law now uniformly treats [aiders and abettors and principals] alike, the [generic definition of theft offense] covers such aiders and abettors as well as principals. And the criminal activities of these aiders and abettors of a generic theft must themselves fall within the scope of the term theft in the federal [immigration] statute.

Id. at 190 (quotation marks omitted).

The Eleventh Circuit followed suit in *In re Colon*. It decided Colon's conviction

for aiding and abetting Hobbs Act robbery qualified as a "crime of violence" under § 924(c)(3)(A) because the substantive offense, Hobbs Act robbery, has as an element the use, attempted use, or threatened use of physical force against another. 826 F.3d 1301, 1305 (11th Cir. 2016). It reasoned:

> Aiding and abetting, under 18 U.S.C. § 2, is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense. A person who aids, abets, counsels, commands, induces or procures the commission of an offense is punishable as a principal. Indeed, under § 2, the acts of the principal become those of the aider and abettor as a matter of law. Nothing in the language of § 924(c)(1) indicates that Congress intended to vitiate ordinary principles of aiding and abetting liability for purposes of sentencing under that subsection.
>
> This Court has held that a companion substantive Hobbs Act robbery conviction qualifies as a "crime of violence" under the use-of-force clause in § 924(c)(3)(A). Because an aider and abettor is responsible for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery. And because the substantive offense of Hobbs Act robbery has as an element the use, attempted use, or threatened use of physical force against the person or property of another, . . . then an aider and abettor of a Hobbs Act robbery necessarily commits a crime that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Id. at 1305 (citations and quotation marks omitted).[12] The Sixth Circuit joined the chorus in *United States v. Tibbs*, 685 F. App'x 456, 465 (6th Cir. 2017) (unpublished) (under plain error review, concluding aiding and abetting Hobbs Act robbery is a "crime of

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[12] Deiter says we are not bound by *In re Colon*, yet he also insists Eleventh Circuit law controls. *See infra* note 11. Convenient, but not compelling. He also invites us to follow the dissent in *In re Colon*, 826 F.3d at 1306-08 (Marten, J., dissenting). We decline the invitation.

violence" under § 924(c)(3) because, *inter alia*, Hobbs Act robbery is a "crime of violence"). And we suggested the same in *McGuire*.

There, the district court concluded McGuire's prior bank robbery conviction under § 2113(a) constituted a "crime of violence" under the elements clause of USSG § 4B1.2(1)(i). 678 F. App'x at 645. We agreed and declined to issue a COA. *Id.* at 645-46. In doing so, we noted: "That McGuire was convicted as an aider and abettor and not as a principal is irrelevant to our analysis. Under 18 U.S.C. § 2, 'whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.'"[13] *Id.* at 645 n.3.

Martinez and *Fell* are inapposite. In those cases, we decided neither conspiracy nor attempted second-degree burglary under the relevant state law satisfied the ACCA's residual clause, i.e., neither involved conduct presenting a serious potential risk of physical injury to another. *Martinez*, 602 F.3d at 1169-73; *Fell*, 511 F.3d at 1038-44. That is because the relevant state law prohibited mere preparatory conduct, such as the purchasing of tools or reconnoitering, which created no risk of a violent confrontation

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[13] *McGuire* involved the definition of "crime of violence" under USSG § 4B1.2. The commentary to that guideline states: "'Crime of violence' . . . include[s] . . . aiding and abetting such offense[]." USSG § 4B1.2, comment. (n.1). The ACCA contains no similar language. Nevertheless, *McGuire* did not rely on the guideline commentary, but rather the language of § 2 itself, in deciding that McGuire's conviction as an aider and abettor was irrelevant in deciding whether he had been convicted of a "crime of violence." *Compare McGuire*, 678 F. App'x at 645 n.3, *with United States v. O'Connor*, 874 F.3d 1147, 1149 n.2 (10th Cir. 2017) (concluding fact that O'Connor's conviction was for aiding and abetting a Hobbs Act robbery was immaterial to deciding whether that conviction was a "crime of violence" under § 4B1.2 because the commentary to the guideline states "crime of violence" includes aiding and abetting such offenses).

between the defendant and another person. *Fell*, 511 F.3d at 1044; *Martinez*, 602 F.3d at 1172-73. We are not here concerned with the residual clause.[14] Moreover, unlike conspiracy and attempt, aiding and abetting is not a separate crime but simply eliminates the legal distinction between aiders and abettors and principals. Therefore, it makes sense to look to the underlying statute of conviction, rather than § 2, to decide whether the elements clause is satisfied.[15]

AFFIRMED.

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[14] *Fell* did say conspiracy to commit second degree burglary in Colorado did not satisfy the ACCA's elements clause because it did not require the use, attempted use, or threatened use of physical force. 511 F.3d at 1037. However, it provided no further explanation. Therefore, it is unclear whether it so decided because (1) Colorado's conspiracy statute did not satisfy that clause, (2) Colorado's second degree burglary statute did not satisfy the clause, or (3) both.

[15] In *Rosemond*, the Supreme Court addressed what the government was required to show to establish a defendant aided and abetted a violation of 18 U.S.C. § 924(c), a "double-barreled crime" which prohibits "[1] using or carrying a firearm [2] when engaged in a crime of violence or drug trafficking crime." 134 S. Ct. at 1245 (quotation marks omitted). The Court held (1) a defendant's active participation in the underlying drug-trafficking or violent crime is sufficient to establish the affirmative act requirement of aiding and abetting liability and (2) the defendant must have advance knowledge that his confederate would be armed in order to satisfy the intent requirement. *Id.* at 1243, 1247-49.

Deiter does not rely on *Rosemond* or suggest that he had to have advance knowledge that his co-defendant would use, attempt to use, or threaten to use physical force against the person of another for his prior conviction to be deemed a "violent felony" under the elements clause. What *Rosemond* teaches is that by pleading guilty to aiding and abetting unarmed bank robbery, Deiter admitted he took an affirmative act in furtherance of the bank robbery with the intent to facilitate that robbery, thereby exposing him to the same liability as a principal.

FILED
United States Court of Appeals
Tenth Circuit

July 23, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WALTER LEE DEITER,

Defendant - Appellant.

No. 17-2159

ORDER

Before **PHILLIPS**, **McKAY**, and **O'BRIEN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

App. B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIV 15-1181 MV/KBM
CR 10-0622 MV

WALTER LEE DEITER,

Defendant.

ORDER OVERRULING DEFENDANT'S OBJECTIONS AND ADOPTING THE CHIEF MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on the Chief Magistrate Judge's Proposed Findings and Recommended Disposition ("PF&RD") (*Doc. 23*)[1], filed April 24, 2017, and on Defendant Walter Lee Deiter's Objections to that PF&RD ("Defendant's Objections") (*Doc. 24*), filed on May 8, 2017.

In her PF&RD, the Chief Magistrate Judge recommended that Defendant Walter Lee Deiter's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be denied and that his claims be dismissed with prejudice. *See Doc. 23.* She concluded that Mr. Deiter had not established ineffective assistance of counsel or prejudice with respect to his trial counsel's reading aloud of excerpts of a belt tape transcript, his failure to obtain EMT reports or to call EMT personnel as witnesses, or his failure to argue that Mr. Deiter's prior bank robbery conviction did not qualify as a predicate offense under the ACCA. *Id.* at 8-15. Similarly, she concluded that Mr. Deiter had not established ineffective assistance or prejudice with regard to the filing of an

[1] Citations to "Doc." refer to docket numbers filed in Civil Case No. 16-0563 MV/KBM.

appellate brief by appellate counsel. *Id.* at 15-16. Finally, the Chief Magistrate Judge recommended that this Court reject Mr. Deiter's position that a conviction for aiding and abetting a federal bank robbery is not a "violent felony" under the force clause of the Armed Career Criminals Act ("ACCA") following *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"). *Id.* at 16-29. Mr. Deiter now asks this Court to reject these recommendations by the Chief Magistrate Judge and to, instead, grant his § 2255 Motion.

When a party files timely-written objections to a magistrate judge's recommendation, the district court will conduct a *de novo* review and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(C). *De novo* review requires the district judge to consider relevant evidence of record and not merely to review the magistrate judge's recommendation. *In re Griego*, 64 F.3d 580, 583-84 (10th Cir. 1995). "[A] party's objections to the magistrate judge's [PF&RD] must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. One Parcel of Real Prop., with Buildings, Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1060 (10th Cir. 1996).

Here, the Court conducts a *de novo* review of the record and considers Mr. Deiter's objections to the PF&RD, of which there are three: (1) that Mr. Deiter's trial counsel's decision to read aloud portions of the belt tape transcript was constitutionally unreasonable and prejudicial to Mr. Deiter; (2) that Mr. Deiter's prior conviction for aiding and abetting a federal bank robbery in violation of 18 U.S.C. § 2 does not satisfy the ACCA's force clause; and (3) that federal bank robbery under 18 U.S.C. § 2113(a)

does not satisfy the ACCA's force clause. *Doc. 24.* Each of these arguments were made by Mr. Deiter in his briefing to the Court prior to the issuance of the PF&RD; however, he has developed these arguments more fully in his Objections, responding to the analysis of the Chief Magistrate Judge's in her PF&RD.

A. Whether Trial Counsel's Reading Aloud of Belt Tape Transcript Excerpts was Unreasonable and Prejudicial.

At trial, the undersigned ruled that the belt tape transcripts of Officer Patricia Whelan were not admissible, other than for impeachment purposes. *See Doc. 224* at 247. However, when Officer Whelan's trial testimony revealed that she could not recall portions of the incident in question, Mr. Deiter's trial counsel, Ryan Villa, sought to refresh her recollection with the previously-excluded belt tape transcript. *Id.* at 244. Upon clarifying that he did not seek admission of the transcript, but instead intended to use it only for refreshing Officer Whelan's recollection, the Court permitted Mr. Villa to read portions of the transcript to Officer Whelan in the presence of the jury. *Id.* at 250-54. The portion of the transcript read aloud included a statement by an unidentified witness at the apartment complex that she heard a man yelling at a woman outside and that he "had a gun." *Doc. 225* at 7. Responding to questioning by Mr. Villa, Officer Whelan admitted that the transcript did not include a request that this witness provide her name or address. *Id.* at 9.

Acknowledging that it was a close question, the Chief Magistrate Judge ultimately concluded that Mr. Deiter had not demonstrated that Mr. Villa was ineffective when he read this transcript excerpt, given the strong presumption against such a finding. As to whether Mr. Deiter was prejudiced, she offered the following rationale:

> Even if the presiding judge disagrees, finding Mr. Villa's decision to read aloud the transcript unreasonable, Deiter cannot show prejudice in the face of the evidence presented against him. To summarize: the jury heard testimony that Officer Whelan, responding to a middle-of-the-night call regarding an altercation in a parking lot, observed [Mr. Deiter] nervously squatting behind a wall on a second-floor apartment breezeway. When she dispatched a fellow officer to determine what Deiter may have dropped on that breezeway, Deiter began to run. The fellow officer's inspection of the breezeway revealed a holster containing a revolver, which officers testified they did not touch without the use of gloves. A forensic scientist testified that DNA testing revealed that the firearm contained two people's DNA, with Deiter's being the major contributor, and that the holster contained only Deiter's DNA. The scientist also testified that the probability that another Caucasian person would have the same DNA provide as [Mr. Deiter] was one in 140 sextillion.
>
> Officer Whelan's observations, combined with this strong, scientific evidence linking Deiter to the firearm, can only be described as overwhelming evidence that Deiter did in fact possess the firearm in question.

Doc. 23 at 14.

Without passing upon the reasonableness of Mr. Villa's decision to read aloud portions of the belt tape transcript, the Court agrees with the Chief Magistrate Judge that Mr. Deiter was not ultimately prejudiced by this decision. While Mr. Deiter insists that the transcript provided the only direct evidence that placed the firearm in his hand, the Court cannot say that but for Mr. Villa's reading of this transcript the result of his jury trial would have been any different. *See Ellis v. Raemisch*, 856 F.3d 766 (10th Cir. 2017). While Officer Whelan did not testify to having an unobscured view of Mr. Deiter holding the firearm, she *did* testify that she saw him squat behind the wall in the same location where the firearm was ultimately found. Indeed, Mr. Deiter's conduct led her to dispatch a fellow officer to determine what Mr. Deiter had left behind the wall. As

discussed, both the firearm and the holster recovered from the breezeway contained Mr. Deiter's DNA, and the holster contained *only* Mr. Deiter's DNA.

Although the Court, like the Chief Magistrate Judge, questions whether Mr. Villa's decision to read aloud from the belt tape transcript was the most productive strategy, in light of the other evidence presented against Mr. Deiter it is unwilling to say that the decision "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). The Court overrules Mr. Deiter's first objection.

B. Whether aiding and abetting a bank robbery in violation of 18 U.S.C. § 2 satisfies the ACCA's force clause.

Mr. Deiter argues that pursuant to *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007) and *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010) aiding and abetting a federal bank robbery does not constitute a violent felony under the force clause of the ACCA. *Doc. 24* at 5-9. *Fell* and *Martinez* involved inchoate crimes – conspiracy and attempt, respectively. In *Fell*, the court determined that because conspiracy to commit second-degree burglary did not require a person to perform an overt act directed toward the entry of the building, it did not qualify as a violent felony under the ACCA. *Fell*, 511 F.3d at 1038-44. In *Martinez*, the court concluded that because a defendant could commit second-degree attempted burglary without an act directed toward entry of the building, the "risk of physical injury to another [was] too speculative to satisfy the residual provision of [the ACCA]." *Martinez*, 602 F.3d at 1170. Mr. Deiter argues that, together, these cases stand for the proposition that inchoate crimes, which may encompass only preparatory conduct, do not qualify as violent felonies under the ACCA. *Doc. 24* at 5-7.

Following the Eleventh Circuit's lead in *United States v. Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016), and relying upon the Supreme Court's analysis in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) and the Tenth Circuit's denial of a certificate of appealability in *United States v. McGuire*, No. 16-3282, 2017 WL 429251 (10th Cir. Feb. 1, 2017) (unpublished), the Chief Magistrate Judge distinguished aiding and abetting from attempt and conspiracy crimes in the context of the ACCA's force clause. *Doc. 23* at 27. This Court, in turn, finds persuasive the rationale set forth in these cases and in the Chief Magistrate Judge's PF&RD and concludes that *Fell* and *Martinez* do not control with respect to Mr. Deiter's aiding and abetting conviction.

Under 18 U.S.C. § 2, "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." § 2. As such, aiding and abetting under § 2 is "not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense." *Colon,* 826 F.3d at 1305. Indeed, "state and federal criminal law now uniformly treats principals and aiders and abettors alike." *Gonzales*, 549 U.S. at 184. "[T]he acts of the principal become those of the aider and abettor as a matter of law." *Colon*, 826 F.3d at 1305. Therefore, if the substantive offense satisfies the ACCA's force clause, so too does the offense of aiding and abetting that substantive offense. *See id.* As the Tenth Circuit put it in *McGuire*: "That [the defendant] was convicted as an aider and abettor and not as a principal is irrelevant to our analysis [of whether the crime has as an element the use, attempted use, or threatened use of physical force]." *McGuire*, 2017 WL 429251 at *2 n.3.

Ultimately, if federal bank robbery satisfies the ACCA's force clause, aiding and abetting a federal bank robbery does as well. The Court overrules Mr. Deiter's second objection.

C. Whether federal bank robbery in violation of 18 U.S.C. § 2113(a) satisfies the ACCA's force clause.

Mr. Deiter's final objection is that, contrary to the Chief Magistrate Judge's conclusion in her PF&RD, federal bank robbery is not a "violent felony" under the force clause of the ACCA, for two principal reasons: (1) it does not require proof of an intentional threat; and (2) it does not require proof of violent force. *Doc. 24* at 9-14.

First, in support of his position that federal bank robbery does not require proof of an intentional threat, Mr. Deiter notes that his bank robbery conviction was required to meet the elements of § 2113(a) as defined by the Eleventh Circuit, rather than the Tenth Circuit. *Doc. 24* at 10. He explains that the Eleventh Circuit, in *United States v. McCree*, 225 F. App'x 860, 863 (11th Cir. 2007) (unpublished), held that federal bank robbery is a general intent crime which requires only a showing that the defendant knew that he was physically taking the money. *Doc. 24* at 10 (quoting *McCree*, 225 F. App'x at 863). According to Mr. Deiter, "the conclusion that federal bank robbery requires an intentional act of intimidation is incongruent with Eleventh Circuit law because federal bank robbery does not require the intentional use of force, or even implied conduct coupled with actual knowledge that such conduct will be perceived as intimidating. *Id.* But, as it turns out, it is actually Mr. Deiter's position that is incongruent with Eleventh Circuit law.

In *United States v. Jenkins*, 651 F. App'x 920 (11th Cir. June 3, 2016) (unpublished), the court held that federal bank robbery, even when committed by

intimidation, satisfies the career offender guideline's force clause, which is identical to the ACCA's force clause.[2] The court in *Jenkins* reasoned as follows:

> "[I]ntimidation" requires the defendant to take actions from which an ordinary person could reasonably infer a threat of bodily harm. The threat of bodily harm is sufficient to qualify as the threatened use of "physical force" or "force capable of causing physical pain or injury to another person. *See Johnson*, 559 U.S. at 140 . . . . Thus, a § 2113(a) offense also qualifies as a crime of violence under U.S.S.G. § 4B1.2(a)'s [force] clause.

Jenkins, 651 F. App'x at 925. As the Chief Magistrate Judge explained in her PF&RD, although federal bank robbery may not require the specific intent to intimidate, "[t]he presence or absence of an element of specific intent does not dispositively determine whether a prior conviction qualifies as a violent felony under the ACCA." *Doc. 23* at 22 (quoting *United States v. Ramon Silva*, 608 F.3d 663, 673 (10th Cir. 2010) internal citations omitted)). So long as a crime requires a defendant to intentionally engage in conduct that objectively constitutes the threatened use of physical force, the crime satisfies the ACCA's force clause, even absent the specific intent to communicate such a threat. *See Ramon Silva*, 608 F.3d at 673.

The Court concludes that federal bank robbery by intimidation, which under Eleventh Circuit law occurs when "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts," *McCree*, 225 F. App'x at 863, satisfies the ACCA's force clause, even if the defendant did not specifically intend those acts to intimidate.

Second, Mr. Deiter insists that federal bank robbery does not require proof of violent physical force. Noting that the phrase "physical force" has been defined as "violent force . . . capable of causing physical pain or injury," Mr. Deiter insists that a

[2] *Compare* U.S.S.G. § 4B1.2(a)(1) *with* 18 U.S.C. § 924(e)(2)(B)(ii).

robbery statute that requires proof of *de minimus* or even no physical force cannot be considered a "violent felony" under the ACCA. *Doc. 24* at 12 (quoting *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson I*")).

In support, Mr. Deiter points to a recent Tenth Circuit case, *United States v. Nicholas*, No. 16cv3043, 2017 WL 1429788 (10th Cir. Apr. 24, 2017) (unpublished). There, the court determined that Kansas robbery did not constitute a "violent felony" under the ACCA, finding that Kansas robbery – that is, "the taking of property from the person or presence of another by force or by threat of bodily harm to any person" -- requires "nothing more than de minimis physical contact or the threat of physical contact, which is insufficient to satisfy the ACCA's force requirement." *Id.* at *3. In reaching this conclusion, the Tenth Circuit relied primarily upon *State v. McKinney*, 961 P.2d 1 (Kan. 1998), where the Kansas Supreme Court found that snatching a purse from a victim's arm, without more, satisfied the threat of bodily harm element of the Kansas robbery statute. *Id.* at *3-4.

Mr. Deiter maintains that, like Kansas robbery, federal bank robbery "does not require that any particular quantum of force be used, attempted or threatened." *Doc. 24* at 13. He notes that convictions under § 2113(a) have been upheld even in the absence of an explicit threat of force. For example, he cites *United States v. Slater*, 692 F.2d 107, 108 (10th Cir. 1982), where the court upheld a federal bank robbery conviction after the defendant walked "unhesitatingly" behind a bank counter and began removing cash from a teller's drawer, and *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005), where the court upheld a federal bank robbery conviction after the defendant and an accomplice jumped on top of the teller counter and opened an unattended,

unlocked cash drawer. In short, Mr. Deiter suggests that because federal bank robbery can be committed without an explicit threat to use violent, physical force, it suffers the same fate under the ACCA as Kansas robbery did in *Nicholas*.

In this Court's view, however, Kansas robbery is distinguishable from the offense of federal bank robbery, though the language of the statutes may be similar in some respects, as it includes an additional and significant statutory element: that the money or property taken *belong to or is in the control or possession of a banking institution.* *See* 18 U.S.C. § 2113(a). Banking institutions, in contrast to private individuals, are known to employ security guards, surveillance, and substantial protections to thwart would-be robbers. And while the modified-categorical approach counsels against consideration of the underlying facts in a particular case, it does not necessitate dispensing with common sense or context.

In the context of a bank robbery, it may actually take very little to communicate a threat of violent, even deadly, force to a reasonable bank teller. Even a statement such as, "You better hand over the money!" communicates an "or else" component when it is delivered to a bank teller absent any conduct or language to allay her fears that she may be subject to physical force. Placing bank employees in fear of the use of violent or deadly force is, uniquely, the operative element that facilitates the taking of a bank's money. *See United States v. Slater*, 692 F.2d 107 (10th Cir. 1982) (holding that a jury could conclude that the elements of § 2113(a) were met, even though the defendant accomplished the taking without a weapon or an explicit threat of the use of physical force, given that "a weapon and a willingness to use it are not uncommon" in the context of a bank robbery).

The Court is simply unwilling to agree with Mr. Deiter's suggestion that the sometimes-implicit nature of threats made during a bank robbery dictates that § 2113(a) therefore lacks an element of the use or threatened use of violent, physical force. Instead, the Court finds persuasive the rationale of the District of New Hampshire in *United States v. Kucinski,* No. 16cv201 PB, 2016 WL 4444736 (D.N.H. Aug. 23, 2016):

> § 2113(a) does not require "an explicit threat of force . . . to establish intimidation." A demand note can therefore constitute intimidation, because the note is an implied threat to use force if the teller refuses the robber's demands. Indeed, the threat of physical force is what makes the demand effective – the teller gives the robber money "because she reasonably fear[s] that the robber would use force if [she] did not satisfy his demands." . . . The same is true of the ACCA. Nothing in the ACCA's text requires an explicit threat of physical force.

Id. at *4 (internal citations and parentheticals omitted). The Court agrees with the Chief Magistrate Judge that federal bank robbery, even by intimidation, has as an element the threatened use of force of the type contemplated in *Johnson I. See United States v. Enoch*, No. 15cr66, 2015 WL 6407763, at *3 (N.D. Ill. Oct. 21, 2015) ("Because intimidation requires a threat, albeit in some cases an implied threat, of violent physical force, robbery [under § 2113(a)] is a crime of violence within the meaning of section 924(c) even though it can be committed by intimidation rather than actual violence.").

Mr. Deiter makes a related argument that "simply placing a person in fear of bodily harm does not necessarily require the use of violent *physical* force." *Doc. 24* at 14 (emphasis in original). He suggests that a person could conceivably commit federal bank robbery through intimidation by threatening to poison a teller, which, even if it put the teller in fear of bodily harm, would not constitute the threatened use of violent,

physical force. *Id.* In addition to being more theoretical than realistic,[3] Mr. Deiter's argument fails for additional reasons.

In *Johnson I*, the Supreme Court examined the phrase "physical force" as used in the ACCA's force clause. While the Court determined that "physical force" meant "violent force" or "force capable of causing physical pain or injury to another person," it also separately considered the meaning of each of the terms, "physical" and "force." *Johnson*, 559 U.S. at 134. It defined "physical" as a "force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force." *Id.* at 138; *United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017) (quoting *Johnson I*). It defined "force" in a number of ways, including "[p]ower, violence, compulsion, or constraint exerted upon a person." *Johnson*, 559 U.S. at 139. In the Court's view, these definitions, particularly the definition of "physical," suggest that while mere offensive touching will not suffice under the ACCA's definition of "physical force," the Supreme Court has not necessarily foreclosed the inclusion of offenses that involve the use of "physical force" through *indirect* means.

Later, in *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Supreme Court again examined the phrase "physical force," this time in the context of 18 U.S.C. § 921(a)(33)(A). *Id.* at 1414. The Court rejected the notion that "deceiving the victim into drinking a poisoned beverage" did not constitute "physical force." *Id.* at 1414-15. It explained that "[t]he use of force . . . is not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." *Id.* at 1415.

[3] When construing the minimum culpable conduct for an offense, such conduct only includes that in which there is a "realistic probability, not a theoretical possibility" that the statute would apply. *United States v. Harris*, 844 F.3d 1260, 1264 (2017).

The Court posited that a contrary conclusion might permit defendants to argue "that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim." *Id.*

While *Castleman* dealt with a different statutory provision,[4] and even distinguished the meaning of "physical force" there from the meaning of "physical force" under the ACCA, *see id.* at 1409-13, courts have nevertheless drawn upon *Castleman's* rationale and concluded that the differences between the statute at issue there and the ACCA are not material on the issue of what it means to "use" physical force. *See, e.g., Kucinski*, 2016 WL 4444736, at *4–5 (concluding that the logic used in *Castleman* to define the "use of physical force" extended to the ACCA's force clause); *see also United States v. Williams*, No. 15cr0069 JDL, 2016 WL 1555696, at *8 n.13 (D. Me. Apr. 15, 2016); *United States v. Bell*, No. 15cr0258 WHO, 2016 WL 344749, at *8 (N.D. Cal. Jan. 28, 2016). This Court agrees that the Supreme Court's analysis of what it means to *use* physical force in *Castleman* is helpful even in the ACCA context.

Contrary to Mr. Deiter's position, the Court finds that *Johnson I* and *Castleman*, taken together, instruct that a threat to use *indirect* physical force during a bank robbery,

[4] In *Castleman*, the issue was whether a particular offense fell within 18 U.S.C. § 922(g)(9), which prohibits a person who has been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm or ammunition. *See* § 922(g)(9). With exceptions not applicable, a "misdemeanor crime of domestic violence" is defined as an offense that (1) is a misdemeanor under Federal, State, or Tribal law, and (2) which "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of a victim . . ." § 921(a)(33)(A). The defendant in *Castleman* argued that his predicate offense did not have as an element the "use of physical force." *Castleman*, 134 S. Ct. at 1409. The district court agreed with him based upon the theory that one could commit the offense at issue by causing bodily injury without "violent contact," for example by poisoning their victim. *Id.* The Supreme Court ultimately disagreed with the defendant, however, concluding that in contrast to the ACCA, Congress incorporated the common-law meaning of "force" – that is, even offensive touching – into § 921(a)'s definition of a "misdemeanor crime of domestic violence." *Id.* at 1410. The Court explained that "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* at 1411.

such as a threat to use poison, still qualifies as a threat to use violent, physical force under the ACCA. After all, the administration of poison would, no doubt, have a harmful, violent effect on the body of the one who ingests it. *See United States v. Pena*, 161 F. Supp. 3d 268, 282 (S.D.N.Y. 2016) (reasoning, in the context of § 924(c), that poisoning a person would constitute the use of *Johnson I* physical force, as "poison can certainly be a strong enough force to cause physical pain or injury to another person"). Furthermore, given the Tenth Circuit's recent acknowledgement that even a "slap in the face," may rise to the level of violent, physical force, *see Harris*, 844 F.3d at 1265, it would be incongruous to hold that the administration of poison would not constitute *Johnson I* physical force.

For all of these reasons, and because it appears that the Tenth Circuit has adopted the majority view that federal bank robbery has as an element the use, attempted use, or threatened use of physical force, s*ee McGuire*, 2017 WL 429251 at *2-3,[5] the Court overrules Mr. Deiter's final objection.

IT IS THEREFORE ORDERED that Mr. Deiter's Objections to the Proposed Findings and Recommended Disposition (*Doc. 24*) are hereby **OVERRULED;**

IT IS FURTHER ORDERED that the Chief Magistrate Judge's Proposed Findings and Recommended Disposition (*Doc. 23*) is hereby **ADOPTED**;

IT IS FURTHER ORDERED that Mr. Deiter's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (*Doc. 3*) is hereby **DENIED**, and his claims are dismissed with prejudice.

[5] The Tenth Circuit, in *McGuire*, concluded that no reasonable jurist would debate a district court determination that federal bank robbery satisfies the force clause of the career offender guideline. *McGuire*, 2017 WL 429251, at *2-3.

IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED**.

MARTHA VÁZQUEZ
UNITED STATES DISTRICT JUDGE