No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

VAN McDUFFY, aka VAN MCDUFFIE
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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

PETITION FOR WRIT OF CERTIORARI

Michael J. Kennedy
Law Offices of Michael Jerome Kennedy, PLLC
333 Flint Street
Reno, Nevada 89501
Counsel for Petitioner

VAN McDUFFY
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Van McDuffy (hereinafter either "Petitioner" or "McDuffy"), respectfully asks leave to file the attached Petition for Writ of Certiorari, without prepayment of cost and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the District Court appointed counsel for petitioner under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Respectfully submitted,

/s/ Michael Kennedy
Michael J. Kennedy
Law Offices of Michael Jerome Kennedy, PLLC

QUESTION PRESENTED FOR REVIEW

What intent, if any, beyond the intent to commit bank robbery, is required to sustain a conviction under 18 U.S.C. § 2113(e), which imposes a mandatory sentence of life imprisonment or death, when the killing is an accident?

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I. Parties To The Proceeding.

There are no parties to this proceeding other than those listed in the caption.

II. Opinion Below.

The decision of the United States Court of Appeals for the Ninth Circuit is entitled *United States v. Van McDuffy*, 890 F.3d 796 (9th Cir. 2018). The opinion was filed on May 15, 2018. Rehearing en banc was denied on August 28, 2018. A copy of the opinion is attached as Appendix A (APP002-008); a copy of the Order denying rehearing en banc is attached as Appendix A-1 (APP010).

III. Basis For Jurisdiction.

This Court has jurisdiction under 28 U.S.C. § 1254. The District Court had jurisdiction under 18 U.S.C. § 3231 and the Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

IV. Constitutional, Statutory and Regulatory Provisions.

Title 18 United States Code Section 2113(a) provides, in pertinent part, that:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; ... Shall be ... imprisoned not more than twenty years ...

18 U.S.C.§ 2113(a), Appendix B (APP012).

Title 18 United States Code Section 2113(b) provides, in pertinent part, that:

> Whoever takes and carries away, with intent to steal or purloin, any property of money or anything of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings in loan association, shall be ...

imprisoned not more than ten years ...[1]

18 U.S.C. § 2113(b), Appendix B (APP012).

Title 18 United States Code Section 2113(c) provides, in pertinent part, that:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

18 U.S.C. § 2113(c), Appendix B (APP012).

Title 18 United States Code Section 2113(d) provides that:

> Whoever, in committing, or attempting to commit, any offense defined in subsections (a) or (b) of this section, assaults any person, or puts in jeopardy the life of any person by use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(d), Appendix B (APP012).

Title 18 United States Code Section 2113(e) provides that:

> Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

18 U.S.C. § 2113(e), Appendix B (APP012-013).

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[1] If the amount does not exceed $1,000, the crime is a misdemeanor. 18 U.S.C. § 2113(b), APP012.

V. Statement Of The Case.

McDuffy is a mentally ill, brain damaged, Vietnam Veteran. TT5 pp. 657-683; EOR 808-834; TT4 pp. 518-596; EOR 669-747; TT4 pp. 461-483; EOR 612-634. McDuffy's medical records are replete with overwhelming documentation showing his forty plus years of mental illness. TT5 pp. 665-669; EOR 816-820; TT4 pp. 555-573; EOR 706-724. McDuffy suffers from a severe and persistent psychotic mental illness, namely schizophrenia. TT5 p. 663-667, 681-683 & 697-703; EOR 814-818, 832-834, & 848-854; TT4 pp. 545, 558- & 595; EOR 696 & 746.

McDuffy has auditory hallucinations: "a 40-year history of hearing things other people don't hear." TT5 pp. 666-669; EOR 817-820. The auditory hallucinations originate from inside and outside his head. TT5 pp. 666-667; EOR 817-818. The auditory hallucinations talk about god and the devil. *Id*.; TT4 pp. 558-574; EOR 709-725. The voice of god and the devil comments on what he is doing and commands him to do things. TT5 pp. 666-667; EOR 817-818; TT4 pp. 572-573; EOR 723-724. The voices are intermittent in nature and can be male or female. The voices have been the same for 40 years. McDuffy has a history of visual hallucinations. TT4 p. 566; EOR 717; TT5 p. 669; EOR 820. McDuffy experiences delusions otherwise known as thought-broadcasting. TT5 pp. 671-672; EOR 822-823. He believes others can read his mind and know what he is going to do before he does it. *Id*. The long-acting injectable Risperidone which the VA psychiatrist used to treat him helped but the voices never go away for good. TT5 pp. 669-671; EOR 820-822. The voices remain one year after the bank robbery and death. TT5 p. 669; EOR 820. Schizophrenia is a treatable but not curable mental illness. TT5 p. 670; EOR 821. Even when properly medicated, as he was on October 16, 2013, McDuffy's medical records show that he continues to experience "breakthrough symptoms" or psychiatric symptoms involving delusions and hallucinations. TT5 pp. 692-693 & 697-699; EOR

843-844 & 848-850.

McDuffy also suffers from a significant and independent brain injury. TT4 pp. 525-558 & 574-596; EOR 676-709 & 725-747; TT5 p. 663; EOR 814. His DSM-5 diagnosis is Major Neurocognitive Disorder. TT4 p 546-558; EOR 697-709. His significant brain injury appears as early as 1995. TT4 p. 555-560; EOR 706-711; Def Ex. 506. By 2012, McDuffy is deemed incompetent for VA purposes, meaning he lacks the mental capacity to control or manage ins own affairs, including the disbursement of funds without limitation. TT3 pp. 386-392 & 405-406; EOR 537-543 & 556-557; TT4 p. 562; EOR 713.

On October 16, 2013, McDuffy retrieves a firearm from his storage unit, takes a taxi to a bank he knew did not have a security guard, enters the bank, brandishes the firearm, and demands money from the regular teller Ms. Baldwin (Baldwin), who is transacting business with a regular bank customer, Mr. Sperry (Sperry), a decorated retired military officer from the Korean and Vietnam wars. TT1 pp. 34-55; EOR 185-206; TT2 pp. 251-258; EOR 402-409; TT3 pp. 313-377; EOR 464-528; Exhibits 1-10 & 29A-29C & 29E.

Sperry intervenes screaming "God damm it, get out of here." Baldwin tells Sperry "Mr. Sperry, please stay out of it, he has the money. Let him go." TT1 pp 39-40 & 52; EOR 106, 190-191 & 203. McDuffy says "this gun is real" and Sperry gets angry, yelling "you son of a bitch" while stepping towards McDuffy as McDuffy steps back. TT1 pp. 40 & 52; EOR 106, 191 & 203; TT2 pp. 105-110; EOR 256-261; TT3 p. 350; EOR 501. The two men are very close. TT1 pp 52-53; EOR 107-108 & 203-204.

As Sperry reaches to grab the gun a single gunshot went off. TT1 pp 40 & 52-53; EOR 106-108, 191 & 203-204; TT3 p. 349; EOR 72. The wound pathway is front to back, right to left, and

downward. TT3 pp 384-385; EOR 535-536. The bullet penetrates Sperry's left chest, through the ribs, heart and lungs and lodges in his posterior. TT3 p. 384; EOR 535. No video angle can definitely show whether or not the decedent Mr. Sperry grabs the gun before the shot went off. TT2 pp. 112-155; Exhibits 1-10. Blank spots exists on camera 7 and 6 video recordings in front of teller stations 4 and 5. Conversely, teller Baldwin's vision as Sperry grabs for the gun is unobscured. TT2 150; EOR 301.

McDuffy takes the money from regular teller Baldwin and then takes money from a merchant bank teller (Ms. Popp). TT1 pp. 56-65; EOR 207-216. Popp describes McDuffy as not seeming angry or agitated but unsure and desperate. TT1 pp. 64-65; EOR 215-216. McDuffy walks out of the bank but does not go to the waiting taxi still parked at the bank. TT2 pp. 251-258; EOR 402-409. An off-duty Reno police officer is inside the bank during the robbery and shooting; he follows McDuffy and later places him under arrest just before McDuffy boards a bus leaving from a near-by bus station. TT2 156-177; EOR 307-328.

During a custodial interview that same day, McDuffy tells Detective Milsap "that he shot, but he didn't mean to, and he was sorry" and "he never intended to shoot at all." TT3 pp. 347-348 & 332; EOR 69-71. Milsap describes McDuffy as "very honest" and appreciates that he had "manned up and spoke with" him. TT3 pp. 240-241; EOR 491-492. Forensic Firearm Examiner opines that the firearm is as close as seven inches from the decedent's chest and no further than three feet, eleven inches when the fatal shot is fired. TT2 pp. 287 & 288-298; EOR 338 & 439-449.

VI. Reasons Why The Petition Should Be Granted.

The question presented is one of exceptional importance: what intent, if any, is required to sustain a conviction under 18 U.S.C. § 2113(e), which imposes a mandatory statutory sentence of

life imprisonment or death, when the killing is an accident?

In *United States v. Jones*, 678 F.2d 102, 106 (9th Cir. 1982), now former Justice Kennedy, in his concurring opinion, concludes that "there must be more than an intent to commit bank robbery" to sustain a conviction under 18 U.S.C. § 2113(e):

> Though we might have done so, the opinion does not address the precise question of what intent is required to sustain a conviction of an aider and abetter, or a principal, under 18 U.S.C. § 2113(e) (1976). **I do interpret the opinion to hold that there must be more than an intent to commit a bank robbery**. In the posture of the case, if there is a retrial, the district court must devise an appropriate instruction. I am somewhat uncomfortable with our failure to give further guidance, but I suppose there is ample justification in the failure of counsel for either party thoroughly to brief the issue.

United States v. Jones, 678 F.2d 102, 106 (9th Cir. 1982) (emphasis supplied) (concurring opinion) (majority holding that both principal liability and aiding and abetting liability is punishable under 18 U.S.C. §§ 2(a) and 2113(e)).

McDuffy produces trial evidence indicating he accidently discharges the firearm. *McDuffy*, 890 F.3d at 798 n.2, APP003 & APP007. The evidence indicating accidental discharge includes the bank teller's testimony that when the bank customer, Sperry, "steps towards" the robber and attempts "to grab the gun", a shot is fired. TT1 pp 52-53; EOR 107-108. McDuffy tells Detective Milsap "that he shot, but he didn't mean to, and he was sorry" during his video/audio custodial interrogation seen and heard by the jury. TT3 pp. 347-348; EOR 69-70. No video angle shows whether or not Sperry grabs either the gun or the arm before the shot went off which kills Sperry. TT2 p. 156; EOR 301.

The Ninth Circuit decision never mentions *Jones* nor former Justice Kennedy's interpretation of 18 U.S.C. § 2113(e) in *Jones*, namely, "that there must be more than an intent to commit bank robbery" to sustain an 18 U.S.C. § 2113(e) conviction.

Instead, the Ninth Circuit decision simply reaches the opposite conclusion:

> In 18 U.S.C. § 2113(e), Congress mandated an enhanced punishment for an individual who kills a person in the course of committing a bank robbery. We conclude the enhancement applies even when the bank robber accidently kills someone. The enhancement does not require a separate mens rea; the only mens rea required is the mens rea necessary to commit the underlying bank robbery.

McDuffy, 890 F.3d at 797, APP004.

McDuffy interprets 18 U.S.C. § 2113(e) the same as former Justice Kennedy: there must be more than an intent to commit bank robbery. McDuffy's interpretation finds support in Supreme Court and Ninth Circuit precedents interpreting 18 U.S.C. §§ 2113(a) and 2113(d) to require actions be volitional as opposed to accidental, and in 18 U.S.C. § 2113 language and its structure. McDuffy therefore requests that this Court grant his petition.

A. **Each Statutory Subsection Of Title 18 United States Code Section 2113 Contains A Separate Actus Rea Element**.

A reviewing court must begin with "the language of the statute." *Bailey v. United States*, 516 U.S. 137, 144 (1995). Here, the indictment in count one (EOR 149) charges McDuffy with violating 18 U.S.C. §§ 2113(a), 2113(d), and 2113(e). *United States v. Faleafine*, 492 F.2d 18, 19-26 (9th Cir. 1974) (en banc) (single offense with lesser included offenses). Subsections (a), (d) and (e) of Title 18 United States Code Section 2113 each contain an explicit *actus rea* requirement or element and a distinct sentencing provision. *See* 18 U.S.C. § 2113(a) ("Whoever ... **takes**" money from any bank "by force and violence, or by intimidation ... Shall be ... imprisoned not more than twenty years"); 18 U.S.C. § 2113(d) ("Whoever ... **assaults** any person, or puts in jeopardy the life of any person by use of a dangerous weapon ... shall be ... imprisoned not more than twenty-give years");. 18 U.S.C. § 2113(e) ("Whoever ... **kills** any person, or forces any person to accompany him without the consent

of such person, shall be imprisoned not more than ten years, or if death results shall be punished by death or life imprisonment) (emphasis added). *See Jones*, 678 F.2d at 108 ("The 'essential elements' of subsection (e) are the commission of a robbery and the killing or kidnaping in connection with it. The accomplice must aid and abet each of these essential elements.").

B. General Intent Crimes: Actions Must Be Volitional As Opposed To Accidental And Knowingly Corresponds To General Intent *Mens Rea*.

A general intent crime requires that actions be volitional as opposed to accidental and knowingly corresponds to general intent. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc); *United States v. Lamott*, 831 F.3d 1153, 1156 (9th Cir. 2016). Therefore, a general intent crime corresponds to **knowingly** as its *mens rea* with respect to each material element of the offense. *See Gracidas-Ulibarry*, 231 F.3d at 1196; *Lamott*, 831 F.3d at 11560-1157; American Law Institute's *Model Penal Code*, *supra*, § 2.02(1) ("... person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense.") (emphasis supplied).

Carter v. United States holds that under 18 U.S.C. § 2113 the presumption in favor of scienter demands proof of general intent – that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime. *Carter v. United States*, 530 U.S. 255, 268 (2000). While the "*actus reus*" in *Carter* for which proof of general intent (volition as opposed to accident) is limited to unarmed bank robbery under 18 U.S.C. § 2113(a), the "actus reus" for McDuffy for which proof of general intent (volition as opposed to accident) includes each additional "*actus reus*" requirement under 18 U.S.C. §§ 2113(d) and 2113(e).

United States v. Odom holds that a bank robber with a concealed gun who never mentions

or insinuates having one, but who displays it inadvertently, cannot be convicted of armed bank robbery under 18 U.S.C. § 2113(d). *United States v. Odom*, 329 F.3d 1032, 1033 (9th Cir. 2003) (reversing 18 U.S.C. § 2113(d) conviction and remanding to reflect 18 U.S.C. § 2113(a) conviction). In reversing the armed bank robbery conviction, the *Odom* panel states:

> The common denominator to the decisions affirming convictions under § 2113(d) is that the robber **knowingly** made one or more victims at the scene of the robbery aware that he had a gun, real or not.

Odom, 329 F.3d at 1035 (emphasis added).

C. Decisions Finding Volitional Action Sufficient But Accidental Conduct Insufficient To Sustain 18 U.S.C. §§ 2113(a) and 2113(d) Convictions Indicate That Congress Did Not Omit A Mens Rea Requirement In § 2113(e).

Under *Carter* and *Odom*, both 18 U.S.C. § 2113(a) [unarmed bank robbery] and 18 U.S.C. § 2113(d) [armed bank robbery] require acting **knowingly** as its *mens rea*. *Carter*, 530 U.S. at 268; *Odom*, 329 F.3d at 1035-1036. The line between intentional display of a gun (real or toy) or lifting a jacket so that a victim can see a gun (or real or toy) tucked in the waistband or mentioning a gun being sufficient to sustain a § 2113(d) conviction – but inadvertent display of a gun being insufficient to sustain a § 2113(d) conviction – is drawn to distinguish between volitional acts on one hand and accidental or inadvertent acts on the other hand. *Odom*, 329 F.3d at 1035-1036.

McDuffy seeks an instruction drawing the same line for accidental versus volitional conduct as his defense to the greater crime in § 2113(e) seeking a lesser included verdict but the trial court rejects despite finding that "§ 2113(e) is a crime of general intent like § 2113(a)." EOR 132. The Ninth Circuit decision fails to answer why both § 2113(a) and § 2113(d) require acting **knowingly** (with volition as opposed to by accident) with respect to the *actus reus* in each subsection but §

2113(e) does not. *Compare McDuffy*, 890 F.3d at 797-802 *with Odom*, 329 F.3d at 1035-1036; *see also Jones*, 678 F.2d at 106 (concurring) ("I do interpret the opinion to hold that there must be more than an intent to commit a bank robbery.").[2]

D. Nothing More Than Congressional Silence In 18 U.S.C. § 2113(e) Suggests That This Court Should Depart From Treating Accidental Conduct Differently Than Volitional Conduct And Impose Strict Liability Under § 2113(e).

The Ninth Circuit decision relies upon the result in *Dean v. United States*, 556 U.S. 568 (2009) to conclude that Congress intended to omit a *mens rea* requirement in 18 U.S.C. § 2113(e). *McDuffy*, 890 F.3d at 799-801, APP005-APP007. *Dean* relies upon the structure of the statue in 18 U.S.C. § 924(c)(1)(A) to reject any intent requirement for subsection (iii). *McDuffy*, 890 F.3d at 799-801, APP005-007. Yet the statutory structure in 18 U.S.C. § 2113 is nothing like 18 U.S.C. § 924(c)(1)(A).

Section 924(c)(1)(A) has the **identical** *actus reus* element (use, carry, or possession) for each of the three sentencing enhancement subsections (catchall penalty, brandish penalty, and/or discharge penalty). Conversely, sections 2113(a), 2113(d) and 2113(e) each have **separate and independent** *actus reus* elements and separate and independent aggravating penalty provisions. *See infra*, pp.11-12. The Ninth Circuit decision repeatedly uses the label "enhancement" or "sentencing enhancement" when it refers to § 2113(e). *McDuffy*, 890 F.3d at 797-802, APP004-007. Labels can be deceiving and it is deceiving to label § 2113(e) a mere "sentencing enhancement."

Jones rejects the assertion that the § 2113(e) language **"Whoever ... kills any person"** is a

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[2] *United States v. Jackson* uses the terms "killing" and "murder" interchangeably in § 2113(e); however, Jackson concerns the "admission of murder" evidence as Jackson is acquitted of the § 2113(e) charge. *United States v Jackson*, 756 F.2d 703, 705-706 (9th Cir. 1985).

mere "sentencing enhancement" and not an "essential element" of the crime under §§ 2113(a), 2113(d) and 2113(e). *Jones*, 678 F.2d at 105 ("The 'essential elements' of subsection (e) are the commission of the robbery and the killing or kidnapping in connection with it."). *Odom* recognizes that "armed bank robbery under § 2113(d) is an aggravated form of bank robbery as defined in § 2113(d), carrying a longer maximum sentence: 25 years imprisonment compared with the 20-year maximum under § 2113(a). *Odom*, 329 F.3d at 1035.

Rather than a mere "sentencing enhancement," § 2113(e) is an even more aggravated form of bank robbery, carrying a mandatory life imprisonment or death. The Ninth Circuit decision's discussion regarding facts such as "drug quantity" under 21 U.S.C. 841, or "brandish" or "discharge" under 18 U.S.C. § 924(c)(1)(A) in *Dean*, that simply increase the mandatory minimum sentence for crimes which have a maximum life imprisonment sentence (see *McDuffy*, 890 F.3d at 798-802, ADD004-006) – is inapplicable to a statue which contains statutory elements that result in aggravating crimes of bank robbery. *Jones*, 678 F.2d at 105; *Odom*, 329 F.2d at 1035.

Indeed, the statutory text in § 924(c)(1)(A)(ii)&(iii) *Dean* interprets provides that "if the firearm is brandished, **be sentenced** to a term of imprisonment of not less than 7 years" and "if the firearm is discharged, **be sentenced** to a term of imprisonment of not less than 10 years." 18 U.S.C. § 924(c)(1)(A)(ii) & (iii) (emphasis supplied). Using the words "be sentenced" is strong evidence that these provisions are mere "sentencing enhancements." 18 U.S.C. §§ 924(c)(1)(A)(i)-(iii).

The fact that both § 2113(b) ("intent to steal or purloin") and § 2113(c) ("possesses ... money ... knowing the [money] to have been [stolen] from a bank ...") explicitly require specific intent *mens rea* while § 2113(a), 2113(d) and 2113(e) make no mention of *mens rea* is not evidence that Congress intended to omit *mens re* from those sections and thus include accidental conduct. The fact

that a statute does not specify any required mental state does not mean that none exists. *Elonis v. United States*, ___ U.S. ___, 135 S.Ct. 2001, 2009 (2015). ("'mere omission from a criminal enactment of any mention of criminal intent' should not be read as 'dispensing with it'"), quoting *Morissette v. United States,* 342 U.S. 246, 250 (1952)).

Neither § 2113(a) nor § 2113(d) contain an explicit *mens rea* requirement; yet *Carter* for section 2113(a), and *Odom* for section 2113(d), each require the *mens rea* of knowingly (volitional not accidental) for the *actus reus* in sections 2113(a) and 2113(d), respectively. The Ninth Circuit decision suggests that "there is no need to read a *mens rea* requirement into § 2113" because "the basic crime of bank robbery is already wrongful conduct." *McDuffy,* 890 F.3d at 802, APP007, citing *Dean*, 556 U.S. at 576. *Odom*, however, presents the identical context but rejects the same result. In *Odom*, the basic crime of unarmed bank robbery is already wrongful conduct for the lesser crime in section 2113(a) – yet this Court requires volitional conduct in using a gun, as opposed to accidental or inadvertent conduct in using a gun, to sustain a conviction for the greater crime in section 2113(d). So the absence of an explicit *mens rea* requirement proves little.

Nothing more than Congress is silent in § 2113(e) suggests that this Court should depart from distinguishing between volitional actions and accidental or inadvertent conduct with respect to each essential element in the aggravating statutory scheme. The trial court rules that "§ 2113(e) is a crime of *general intent* just like § 2113(a)." EOR 132:01-02. Yet the instructional error at trial and the Ninth Circuit decision imposes strict liability under § 2113(e).

E. The False Equivalency Between 18 U.S.C. § 2113(e) And The Felony Murder Rule.

The Ninth Circuit decision also relies upon the result in *Dean v. United States*, 556 U.S. 568

(2009) to conclude that Congress intended to omit a *mens rea* requirement in 18 U.S.C. § 2113(e) because it is the functional equivalency of the federal-murder rule but in the form of a sentencing enhancement. McDuffy, 890 F.3d at 798-802, APP005-APP007. This is a false equivalency. *McDuffy* concludes that:

> § 2113(e) is the functional equivalent of the felony-murder rule but in the form of a sentencing enhancement. Felony-murder does not require a mens rea beyond the mens rea necessary to commit the underlying felony. *See Dean*, 556 U.S. at 575-76, 129 S.Ct. 1849. Neither does the sentencing enhancement equivalent of felony-murder in § 2113(e) require a separate mens rea.

McDuffy, 890 F.3d at 802, APP007.

This conclusion is directly in conflict with precedents interpreting 18 U.S.C. §§ 2113(d) and 2113(e). "Cases arising under § 2113(d) hold that the government must show that the defendant aided and abetted the principle in every 'essential element' of the offense." *Jones*, 678 F.2d at 105. "Under a § 2113(d) charge the government must therefore show that the defendant aided and abetted the principal both in the act of bank robbery and in the principal's use of 'a dangerous weapon or device' during the act." *Jones*, 678 F.2d at 105, quoting *United States v. Short*, 493 F.2d 1170, 1172 (9th Cir. 1974), *modified*, 500 F.2d 676 (9th Cir. 1974). If *McDuffy* were correct that "the only mens rea required is the mens rea necessary to commit the underlying bank robbery" under the statutory scheme in 18 U.S.C. §§ 2113(a), 2113(d) and 2113(e), then the trial court's failure in *Short* to instruct the jury on aiding and abetting the use of the weapon, an "essential element" of the crime of armed bank robbery, would **not** have been reversible error. *Jones*, 678 F.2d at 105, *Short*, 493 F.2d at 1172. And *Odom* specifically rejects any conclusion that the *mens rea* necessary to commit the underlying bank robbery is sufficient to sustain a § 2113(d) conviction for inadvertent or

accidental conduct.

Jones holds that the "'essential elements' of subsection (e) are the commission of the robbery and the killing or kidnaping in connection with it," and that the "accomplice must aid and abet each of these essential elements." *Jones*, 678 F.2d at 105. If § 2113(e) is the "functional equivalent of the felony-murder rule,"then Mr. Jones would have been guilty of the § 2113(e) crime based upon intending to commit bank robbery because felony-murder requires only the *mens re* to commit the underlying felony. *United States v. Miguel*, 338 F.3d 995, 1003 & 1007 (9th Cir. 2003) ("To convict someone of felony murder, the Government must show that a participant committed the killing during the course of the felony" and that participant need not be the defendant) (Defendants Miguel's and Jose's felony murder convictions reversed because evidence suggested Calarruda was the gunman and he was a non-participant at the time of shooting).

Instead, *Jones* reverses the § 2113(e) conviction because "[i]t is not enough for the jury to find that the defendant aided and abetted a bank robbery in which a killing occurred." *Jones*, 678 F.2d at 106. "The trial court should, in addition, have instructed the jury to determine whether the [Jones] aided and abetted the killing by the principal. *Jones*, 678 F.2d at 106.

The *Jones* holding interpreting § 2113(e) and the felony murder rule are functionally opposite rather than functionally equivalents. The cases outside the Ninth Circuit, namely, *United States v. Vance*, 764 F.3d 667 (7th Cir. 2014), *United States v. Jackson*, 736 F.3d 953 (10th Cir. 2013), and *United States v. Allen* 247 F.3d 741 (8th Cir. 2001), *judgment vacated on other grounds*, *Allen v. United States*, 536 U.S.953 (2002), and *United States v. Poindexter*, 44 F.3d 406 6th Cir. 1995) similarly rely on the false equivalency between § 2113(e) and the felony murder rule.

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F. Congress Uses The Active Voice Rather Than The Passive Voice In 18 U.S.C. §§ 2113(a), 2113(d) And 2113(e) Which Is Further Support That Accidental Conduct Is Insufficient Under § 2113(e).

Contrary to the Ninth Circuit's decision's erroneous conclusion that "Section 2113(e) ... even describes the killing in the passive voice ('if death results')," *McDuffy*, 890 F.3d at 801, APP007, Congress uses the active voice, not the passive voice, in 18 U.S.C. § 2113(e). See 18 U.S.C. § 2113(e) ("Whoever, in committing any offense defined in this section, ... **kills any person**, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.") (emphasis added).

The Ninth Circuit decision **omits** this active voice in defining the *actus rea* in Section 2113(e) (**"Whoever ... kills any person ..."**) in its discussion of Section 2113(e)'s "relevant part." *See McDuffy*, 890 F.3d at 797-802, APP004- 007 ("Whoever, in committing any offense defined in this section ... if death results shall be punished by death or life imprisonment). The Ninth Circuit decision also **omits** this active voice ("**Whoever ... kills any person** ...") when it applies "the Supreme Court's reasoning in *Dean* to this case." *See McDuffy*, 890 F.3d at 801-802, APP007 ("Section 2113(e) makes no mention of a mens rea and even describes the killing in a passive voice ('if death results'").

Dean relies upon Congress's use of the passive voice in 18 U.S.C. § 924(c)(1)(A)(iii) as indication that it does not require proof of intent. *Dean*, 556 U.S. at 572 ("if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."). *Dean* provides that:

> The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. *Cf. Watson v. United States*, 552 U.S. 74, 81, 128 S.Ct. 579, 584, 169 LED.2d 472 (2007) (use of passive voice in statutory phase "to be used" in 18 U.S.C. § 924(d)(1) reflects "agnosticism ...

> about who does the using"). It is whether something happened–not how or why it happened–that matters.

Dean, 556 U.S. at 572.

The active voice focuses on how or why it happened, rather than on whether something happened. *Dean*, 556 U.S. at 572. The active voice focuses on a specific actor's intent or culpability with respect to an event. *Id*. at 572. Whereas § 924(d)(1) use of the passive voice "to be used ... reflects agnosticism ... about who does the using," the opposite is true with § 2113(e) use of the active voice "**Whoever ... kills any person**." Accordingly, Congress's use of the active voice in § 2113(a), § 2113(d), and § 2113(e) indicates that each statutory section requires proof of general intent, specifically acting with volition not by accident.

VII. Conclusion

McDuffy respectfully requests this Court grant his Petition for Writ of Certiorari.

Respectfully Submitted,

/s/ Michael Kennedy
Michael J. Kennedy, Esq.
Counsel for Van McDuffy

VIII. **Certificate of Service**.

VAN McDUFFY Petitioner, v. UNITED STATES OF AMERICA, Respondent.	USDC Case No. 3:13-cr-108–MMD-VPC CA No. 16-10520

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers. That on November 20, 2018, he served a copy of the attached Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States mail, postage paid to the addresses named below:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

/s/ Michael Kennedy
Michael Jerome Kennedy