No. _____

In the

Supreme Court of the United States

LISTON DAVID, 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

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Question Presented

Can federal bank robbery under 18 U.S.C. § 2113(a) and (d) be a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), where the offense fails to require any intentional use, attempted use, or threat of violent physical force

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Petition for Writ of Certiorari

Liston David petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's order denying Mr. David the issuance of a certificate of appealability ("COA") was not published. App. 1a. The district court issued a written order denying Mr. David's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 and a COA. App. 2a-5a.

Jurisdiction

The Ninth Circuit issues its order denying Mr. David a COA on November 6, 2018. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

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

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and —
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

Statement of the Case

The district court had jurisdiction over Mr. David's motion pursuant to 28 U.S.C. § 2255(b) and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 2253(a) and 1291.

Mr. David was convicted, following a jury trial of: two counts of conspiracy to commit armed bank robbery, in violation of 18 U.S.C. § 361 (Counts 1 and 4); two counts of armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (Counts 2 and 5); and two counts of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (Counts 3 and 6). On March 13, 2006, he was sentenced to 37 years imprisonment under the Sentencing Guidelines--5 years on each of Counts 1, 2, 4, and 5, to be served concurrently,; plus a mandatory consecutive 7 years on Count 3 and a mandatory consecutive 25 years on Count 6.

On June 26, 2015, this Court decided *Samuel James Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that Armed Career Criminal Act's (ACCA) residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutional. Within a year of that decision, Mr. David filed a 28 U.S.C. § 2255 motion attacking his conviction and sentence. He argued that *Johnson* applied to and voided the residual clause in § 924(c)(3)(B), and that his conviction was not categorically a crime of violence under the elements clause in the relevant provision. On the latter point, Mr. David argued that federal bank robbery

was not a crime of violence under the elements clause because "intimidation" for purposes of Section 2113 did not require the use, attempted use, or threatened use of *violent* physical force, nor did it require *intentional* threatened force.

On July 31, 2017, the district court denied Mr. David's request for relief and denied his request for a certificate of appealability. Mr. David requested a certificate of appealability from the Ninth Circuit on August 24, 2017. Thereafter, the Ninth Circuit decided *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), *cert. denied*, 139 S. Ct 203 (2018), which held that, regardless of the continuing viability of the residual clause, even unarmed bank robbery was a crime of violence under the elements clause--and, perforce, armed bank robbery was as well. Based on *Watson* in part, the Ninth Circuit denied a certificate of appealability to Mr. David and to all those individuals who had filed a 2255 motion relying on *Johnson* and challenging Section 924(c) convictions based on federal (unarmed and armed) bank robbery.

Reason for Granting the Writ

The Court should grant the writ of certiorari. A number of circuits have held that federal bank robbery by intimidation—conduct that does *not* require any specific intent or any actual or threatened violent force—qualifies as a crime of violence under the elements clauses--while, at the same time, those same courts have acknowledged an ever decreasing bar for what constitutes "intimidation" in the context of *sufficiency* cases. The courts cannot have it both ways--either bank robbery requires a threat of violent force, or it doesn't, but the same rule must apply to both sufficiency cases and to the categorical analysis. Given the heavy consequences that attach to a bank robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of caselaw into order.

A. The categorical approach determines whether an offense is a crime of violence.

To determine if an offense qualifies as a "crime of violence," courts apply the categorical approach to discern the "minimum conduct criminalized" by the statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013); *Almanza-Arenas v. Lynch*, 815 F.3d 469, 482 (9th Cir. 2016) (en banc). Courts must "disregard[] the means by which the defendant committed his

crime, and look[] only to that offense's elements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under the rubric, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190-91 (alterations omitted). If the statute of conviction criminalizes some conduct that does involve intentional violent force and some conduct that does not, the statute of conviction does not categorically constitute a crime of violence. *Mathis*, 136 S. Ct. at 2248.

There are two requirement for "violent force." First, violent *physical* force is required for a statute to meet § 924(c)'s elements clause. *Stokeling v. United States*, __ S. Ct. __, 2019 WL 189343, *6 (Jan. 15, 2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*")). In *Johnson I*, this Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. In *Stokeling*, this Court recently interpreted *Johnson I*'s "violent physical force" definition to encompass physical force "potentially" causing physical pain or injury to another. __ S. Ct. __, 2019 WL 189343 at *8. Second, the use of force must also be intentional and not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016).

The Ninth Circuit was wrong to conclude that federal bank robbery satisfied both requirement--in fact, bank robbery requires neither violent

physical force or intentional force.

1. Federal bank robbery does not require the use or threat of violent physical force.

First, intimidation for purposes of the federal bank robbery statute can be, and often is, accomplished by a simple demand for money. While a verbal request for money may have an emotional or intellectual force on a bank teller, it does not require a threat of violent force must be "capable" of "potentially" "causing physical pain or injury" to another, *Stokeling*, __ S. Ct. __, 2019 WL 189343 at *8.

For example, in *United States v. Lucas*, the defendant walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). The Ninth Circuit held that by "opening the bag and requesting the money," the defendant employed "intimidation," and sustained the conviction. *Id.* at 248. Because there was no threat--explicit or implicit--to do anything, let alone use violence, if that demand was not met, the minimum conduct necessary to sustain a conviction for bank robbery does not satisfy *Stokeling*'s standard for a crime of violence under the elements clause.

Likewise, in *United States v. Hopkins*, the defendant entered a bank and gave the teller a note reading, "Give me all your hundreds, fifties and

twenties. This is a robbery." 703 F.2d 1102, 1103 (9th Cir. 1983). When the teller said she had no hundreds or fifties, the defendant responded, "Okay, then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The trial evidence showed the defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.* But the Ninth Circuit affirmed, holding "the threats implicit in [the defendant's] written and verbal demands for money provide sufficient evidence of intimidation to support the jury's verdict." *Id.*

Despite the fact that the Ninth Circuit has concluded that such minimal conduct is sufficient to sustain a conviction, the Ninth Circuit concluded in *Watson* that bank robbery *always* requires the threatened use of violent physical force. This decision cannot be squared with the Circuit's sufficiency decisions and means that either the Ninth Circuit is ignoring this Court's decisions setting out the standard for violence---or, for decades, people have been found guilty of crime of bank robbery who simply aren't guilty. Either way, the matter requires this Court's intervention.

This pattern of inconsistent holdings applies broadly across the circuits. For example, the Tenth Circuit affirmed a bank robbery by intimidation conviction where the defendant simply helped himself to the money and made neither a demand nor a threat to use violence. *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (defendant entered a

bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing). And yet, the same Court has consistently concluded since *Johnson I* and *Johnson II* that bank robbery requires the violent use of force. *E.g., United States v. Higley*, 726 F. App'x 715, 717 (10th Cir. 2018).

The Fourth Circuit, in *United States v. Ketchum*, similarly upheld a bank robbery by intimidation conviction where the defendant affirmatively voiced no intent to use violent physical force. 550 F.3d 363, 365 (4th Cir. 2008). To the contrary, the *Ketchum* defendant gave a teller a note that read, "These people are making me do this," and then the defendant told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *Id.* The teller gave the defendant $1,686, and he left the bank. *Id.* And yet, despite having cases like *Ketchum* on the books, the Fourth Circuit has *also* held for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016)), *cert. denied*, 137 S. Ct. 164 (2016).

Likewise, the Fifth Circuit upheld a conviction for robbery by intimidation where there was no weapon, no verbal or written threat, and when the victims were not actually afraid, because a reasonable person would

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

The Eleventh Circuit affirmed a robbery in *United States v. Kelley*, by analyzing whether the defendant engaged in "intimidation" from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant. 412 F.3d 1240, 1244-45 (11th Cir. 2005). In *Kelley*, when a teller at a bank inside a grocery store left her station to use the phone, two men laid across the bank counter to open her unlocked cash drawer, grabbing $961 in cash. *Id.* at 1243. The men did not speak to any tellers at the bank, did not shout, and did not say anything when they ran from the store. *Id.* The tellers testified they were "shocked, surprised, and scared," but did nothing to stop the robbery. *Id.* The defendant was found guilty of bank robbery by intimidation without ever uttering a verbal threat or expressing an implied one. *Id.* at 1245. Yet, once again, the Eleventh Circuit *also* holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018).

All of these courts have applied a non-violent construction of "intimidation" when determining whether to affirm a bank robbery

conviction, but have held that "intimidation" *always* requires a defendant to threaten the use of violent physical force. The two positions cannot be squared.

The Ninth Circuit reached its conclusion by asserting that bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson I* standard.'" 881 F.3d at 785 (citing *Johnson 2010*, 559 U.S. 133). It is wrong, however, to equate *willingness* to use force with a threat to do so. Indeed, the Ninth Circuit has previously acknowledged this very precept. In *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016), the government argued that a defendant who commits a robbery while armed harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. In finding that Massachusetts armed robbery statute does not qualify as a violent felony, the Court rejected the government's position and held that "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id. Watson* failed to honor, or even address, this distinction.

Certiorari is necessary to harmonize these contradictory lines of cases.

2. Federal bank robbery is a general intent crime.

Second, the elements clause of Section 924(c) and the career offender enhancement requires that the use of violent force to be intentional and not

merely reckless or negligent. *Leocal*, 543 U.S. at 12-13; *Benally*, 843 F.3d at 353-54. But to commit federal bank robbery by intimidation, the defendant need not *intentionally* intimidate.

This Court holds § 2113(a) "contains no explicit *mens rea* requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). This Court held in *Carter* that federal bank robbery does not require an "intent to steal or purloin." *Id.* In evaluating the applicable mens rea, this Court emphasized it would read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269.

The *Carter* Court recognized bank robbery under § 2113(a) "certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)," *id.*, but found no basis to impose a specific intent in § 2113(a), *id.* at 268-69. Instead, the Court determined "the presumption in favor of scienter demands only that we read subsection (a) as requiring 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)." *Id.* at 268.

This Court's classification of § 2113(a) as a general intent crime in *Carter* means the statute requires nothing more than knowledge—a lower mens rea than the specific intent required by the elements clause.

Consistent with *Carter*, the Ninth Circuit holds juries need not find intent in § 2113(a) cases. Rather, in the Ninth Circuit, a finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. This is not enough to classify an offense as a crime of violence.

For example, in *United States v. Foppe*, the Ninth Circuit held a jury need not find the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The Ninth Circuit held a specific intent instruction was unnecessary because "the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation." *Id.* Nowhere in *Foppe* did the Ninth Circuit suggest that the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see also Hopkins*, 703 F.2d at 1103 (approving instruction stating intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear).

Other circuits' decisions are in accord: bank robbery by intimidation

focuses on the objective reaction of the victim, not on the defendant's intent. *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (citation omitted) ("The intimidation element of § 2113(a) is satisfied if an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation. . . . [N]othing in the statute even remotely suggests that the defendant must have intended to intimidate."); *Kelley*, 412 F.3d at 1244 ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating.; *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

As this Court has recognized, an act that turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks," requires only a negligence standard, not intent. *Elonis*, 135 S. Ct. at 2011. Because jurors in a bank robbery case are called on only to judge what a reasonable bank teller would feel--as opposed to the defendant's intent--the statute cannot be deemed a categorical crime of violence.

In sum, *Watson*'s sub silentio holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Consequently, this Court should grant certiorari to clarify that bank robbery

cannot be a crime of violence under the elements clause, because general intent "intimidation" does not satisfy that standard.

B. The "armed" element of armed bank robbery does not create a crime of violence.

Mr. David's Section 924(c) conviction relies on his commission of *armed* bank robbery, which requires proof a defendant "use[d] a dangerous weapon or device." 18 U.S.C. § 2113(d). This fact does not undermine Mr. David's argument. Indeed, *Watson* did not address the armed element of armed bank robbery other than to state that because "[a] conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery," "armed bank robbery under § 2113(a) and (d) cannot be based on conduct that involves less force than an unarmed bank robbery requires." 881 F.3d at 786.

Moreover, the "dangerous weapon or device" standard is less pernicious than it seems. For one thing, because the standard applies from the point of view of the victim, a "weapon" was dangerous or deadly if it "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986).

Relying on *McLaughlin*, the Ninth Circuit affirms armed bank robbery convictions that do not involve actual weapons. In *United States v. Martinez-Jimenez*, for example, the defendant entered a bank and ordered people in the lobby to lie on the floor while his partner took cash from a customer and two bank drawers. 864 F.2d 664 (9th Cir. 1989). The defendant "was holding

an object that eyewitnesses thought was a handgun" but was in fact a toy gun he purchased at a department store. *Id.* at 665. His partner testified that "neither he nor [the defendant] wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives." *Id.* Yet, the defendant was guilty of armed bank robbery even where: (1) he did not "want[] the bank employees to believe [he] had a real gun," and (2) he believed anyone who perceived the gun accurately would know it was a toy. Such a defendant does not intend to threaten violent force.

Other federal circuits also hold armed bank robbery includes the use of fake guns. "Indeed, every circuit court considering even the question of whether a fake weapon that was never intended to be operable has come to the same conclusion" that it constitutes a dangerous weapon for the purposes of the armed robbery statute. *United States v. Hamrick,* 43 F.3d 877, 882-83 (4th Cir.1995); *see e.g., United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon for purposes of § 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett,* 3 F.3d 390, 391 (11th Cir.1993) (same); *United States v. Medved,* 905 F.2d 935, 939 (6th Cir.1990) (same).

Indeed, this Court's reasoning in *McLaughlin* holds that an unloaded or toy gun is a "dangerous weapon" for purposes of § 2113(d) because "as a

consequence, it creates an immediate danger that a violent response will ensue." 476 U.S. at 17-18. Thus, circuit courts including the Ninth Circuit define a "dangerous weapon" with reference to not only "its potential to injure people directly" but also the risk that its presence will escalate the tension in a given situation, thereby inducing *other people* to use violent force. *Martinez-Jimenez*, 864 F.2d at 666-67. In other words, the armed element does not require *the defendant* to use a dangerous weapon violently against a victim. Rather, the statute can be satisfied where the defendant's gun (even if a toy) makes it more likely that a *police officer* will use force in a way that harms a victim, a bystander, another officer, or even the defendant. *Id.* A statute does not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone *other than* the defendant.

In other words, *Watson* is correct that the "armed" part of armed bank robbery does not control.

C. The federal bank robbery statute is indivisible and not a categorical crime of violence under 18 U.S.C. § 924(c).

The federal bank robbery statute is not a crime of violence for a third reason--the federal bank robbery statute includes both bank robbery and bank extortion. Because bank extortion does not require a violent threat, and because the statute is not divisible, this overbreadth is fatal.

The Ninth Circuit did not reach the question of whether bank extortion

can be accomplished without fear of physical force--though the caselaw makes clear that it can. *United States v. Valdez*, 158 F.3d 1140, 1143 n.4 (10th Cir. 1998) (observing that "an individual may be able to commit a bank robbery under the language of 18 U.S.C. § 2113(a) 'by extortion' without the threat of violence"). Rather, with little analysis, the Court concluded that bank robbery and bank extortion were divisible portions of the statute. *Watson*, 881 F.3d at 786. This analysis gives short shrift to this Court's divisibility opinions.

This Court has held that, where a portion of a statute is overbroad, a court must determine whether the overbroad statute is divisible or indivisible. *Mathis*, 136 S. Ct. at 2249. If the statute is divisible, the court may apply the modified categorical approach to determine if any of the divisible parts are crimes of violence and if the defendant violated a qualifying section of the statute. *Id.* If a criminal statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,'" the statute is divisible. *Descamps*, 570 U.S. at 263-64. In assessing whether a statute is divisible, courts must assess whether the statute sets forth indivisible alternative means by which the crime could be committed **or** divisible alternative elements that the prosecution must select and prove to obtain a conviction. *Mathis*, 136 S. Ct. at 2248-49. Only when a statute is divisible may courts then review certain judicial documents to assess whether the defendant was convicted of an alternative element that meet the

elements clause. *Descamps*, 570 U.S. at 262-63.

Watson summarily held the federal bank robbery statute, 18 U.S.C. § 2113(a), is divisible because "it contains at least two separate offenses, bank robbery and bank extortion." 881 F.3d at 786 (citing *United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006) and *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991)). The sources it cited do not establish that § 2113(a) is divisible. Rather, each indicates the exact opposite: that force and violence, intimidation, and extortion are indivisible means of satisfying a single element.

Eaton does not make the case for divisibility. *Eaton* points out that bank robbery is defined as "taking 'by force and violence, *or* by intimidation . . . *or* . . . by extortion' anything of value from the 'care, custody, control, management, or possession of, any bank. . . ." *Eaton*, 934 F.2d at 1079 (emphasis added) (citation omitted). But it goes on to note that the "essential element" of bank robbery "could [be] satisfied . . . through mere 'intimidation.'" This seems to make the opposite case--that the element is a wrongful taking, and that violence, intimidation, and extortion are merely means of committing the offense.

Jennings is no more persuasive. *Jennings* addressed the application of a guideline enhancement to the facts of a bank robbery conviction. 439 F.3d at 612, and in so doing, notes that bank robbery "covers not only individuals

who take property from a bank 'by force and violence, or by intimidation,'" as defendant Jennings did," "but also those who obtain property from a bank by extortion." *Jennings*, 439 F.3d at 612. A statement of the statutes coverage does not affect the divisibility analysis.

Watson also failed to cite *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which held that "bank larceny" under § 2113*(b)*—which prohibits taking a bank's property "with intent to steal or purloin"—is not a lesser included offense of "bank robbery" under § 2113*(a)*. 891 F.2d at 734. In the course of reaching that conclusion, *Gregory* compared the elements of the two offenses, holding "[b]ank robbery is defined as taking or attempting to take 'by force and violence, *or* by intimidation . . . *or* . . . by extortion' anything of value from the 'care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . . .' 18 U.S.C. § 2113(a)." *Id.* (alteration in original) (emphasis added).

Other circuits have similar decisions. The First Circuit specifically holds that § 2113(a) "includes both 'by force and violence, or intimidation' and 'by extortion' as separate *means* of committing the offense." *United States v. Ellison*, 866 F.3d 32, 36 n.2 (1st Cir. 2017) (emphasis added). The Seventh Circuit's model jury instructions specifically define extortion as a "means" of violating § 2113(a): "The statute, at § 2113(a), ¶1, includes a *means* of violation for whoever 'obtains or attempts to obtain by extortion.' If a

defendant is charged with this *means* of violating the statute, the instruction should be adapted accordingly." Pattern Criminal Jury Instructions of the Seventh Circuit 539 (2012 ed.) (emphasis added). The Third Circuit agrees. *United States v. Askari*, 140 F.3d 536, 548 (3d Cir. 1998) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery."), *vacated on other grounds*, 159 F.3d 774 (3d Cir. 1998).

The Fourth Circuit, in *United States v. Williams*, treated "force and violence," "intimidation," and "extortion" as separate means of committing § 2113(a) bank robbery. 841 F.3d 656 (4th Cir. 2016). "As its text makes clear, subsection 2113(a) can be violated in two distinct ways: (1) bank robbery, which involves taking or attempting to take from a bank by force and violence, intimidation, or extortion; and (2) bank burglary, which simply involves entry or attempted entry into a bank with the intent to commit a crime therein." 841 F.3d at 659. Bank robbery, the Fourth Circuit wrote, has a single "element of force and violence, intimidation, or extortion." *Id.* at 660.

And the Sixth Circuit, without deciding the issue, noted § 2113(a) "seems to contain a divisible set of elements, only some of which constitute violent felonies—taking property from a bank by force and violence, or intimidation, or extortion on one hand and entering a bank intending to

commit any felony affecting it . . . on the other." *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017).

Section 2113(a), in other words, may be divisible into two crimes at most: robbery (under the first paragraph) and entering a bank with the intent to commit a felony (under the second paragraph). But the robbery offense is not further divisible; it can be committed through force and violence, *or* intimidation, *or* extortion. These three statutory alternatives exist within a single set of elements and therefore must be means.

In addition to the caselaw making this point, the statute's history confirms bank robbery is a single offense that can be accomplished "by force and violence," "by intimidation," or "by extortion." Until 1986, § 2113(a) covered only obtaining property "by force and violence" or "by intimidation." *See United States v. Holloway*, 309 F.3d 649, 651 (9th Cir. 2002). A circuit split ensued over whether the statute applied to wrongful takings in which the defendant was not physically present inside the bank. H.R. Rep. No. 99-797 sec. 51 & n.16 (1986) (collecting cases). Most circuits held it did cover extortionate takings. *Id.* Agreeing with the majority of circuits, the 1986 amendment added language to clarify that "extortion" was a means of extracting money from a bank. *Id.* ("Extortionate conduct is prosecutable [] under the bank robbery provision. . . ."). This history demonstrates Congress did not intend to create a new offense by adding "extortion" to § 2113(a), but

did so only to clarify that such conduct was included within bank robbery. Obtaining property by extortion, in other words, is merely an alternative means of committing robbery.

Because § 2113(a) lists alternative means, it is an indivisible statute. And because the Ninth Circuit disregarded this Court's caselaw on divisibility when it reached the opposite conclusion, the Court should grant this petition.

Conclusion

For the foregoing reasons, Mr. David respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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