No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

WILLIAM FLOYD MOORE,

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 ON REVIEW

Given this Court's holding in *Carter v. United States*, 530 U.S. 255, 268 (2000), that federal bank robbery under 18 U.S.C. § 2113(a) is a general intent rather than a specific intent crime, and given decades of circuit precedent holding that intimidation under the statute is judged by the reasonable reaction of the listener rather than by the defendant's intent, could reasonable jurists conclude that federal bank robbery is not a crime of violence under the elements clause of the Armed Career Criminal Act's violent felony definition, 18 U.S.C. § 924(e)(2)(B)(i), because the offense fails to require any intentional use, attempted use, or threatened use of violent physical force?

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Petition for Certiorari

Petitioner William Floyd Moore respectfully petitions for a writ of certiorari to review the two final orders of the United States Court of Appeals for the Ninth Circuit in Case Nos. 17-35986 and 17-35989, denying certificates of appealability from the denial of relief under 28 U.S.C. § 2255.

Order Below

The Ninth Circuit's unpublished orders denying the petitioner's motions for certificates of appealability from the denial of his 28 U.S.C. § 2255 motions are attached at Appendix 1 and 2. The district court's unpublished opinion and order denying Mr. Moore's 28 U.S.C. § 2255 motions and declining to issue a certificate of appealability is attached at Appendix 3.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final orders in these cases on November 6, 2018. This petition is timely under Supreme Court Rule 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

The statute providing for collateral review of federal sentences is 28 U.S.C. § 2255, which is attached at Appendix 13. Under 28 U.S.C. § 2253(c), a movant cannot appeal the denial of relief under 28 U.S.C. § 2255 without a certificate of appealability:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. § 2253.

In the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), attached at Appendix 12, Congress prescribed a greater minimum and maximum sentence for certain firearms offenders with prior convictions for a "violent felony" or a "serious drug offense":

(e)(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).

18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as follows:

(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; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B). Clause (i) of the violent felony definition is commonly referred to as the elements clause. The first part of clause (ii) listing particular types of offenses is commonly referred to as the enumerated offenses clause. The final part of clause (ii), beginning with "or otherwise involves," is commonly referred to as the residual clause.

Federal bank robbery is punished under 18 U.S.C. § 2113(a), which provides in full:

> (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.

Reasons For Granting The Writ

Mr. Moore requests certiorari to bring internal consistency to federal circuit precedent interpreting the intimidation element of federal bank robbery under 28 U.S.C. § 2113(a) and to reconcile that precedent with this Court's interpretation of the bank robbery statute to encompass a minimal general intent requirement in *Carter v. United States*, 530 U.S. 255, 268 (2000).

Circuit courts continue to erroneously hold that federal bank robbery by intimidation qualifies as a violent felony under the ACCA and a crime of violence under analogous sentencing enhancement provisions. *See, e.g.*, *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018) (holding federal bank robbery is a crime of violence under § 924(c)(3)(A)); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016) (same); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017) (holding that federal bank robbery is a crime of violence under U.S.S.G. § 4B1.2(a)(1)); *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (holding that federal carjacking by intimidation is a crime of violence under § 924(c)(3)(A)). However, "intimidation," as broadly construed by this Court and by the circuits for decades, requires no specific intent on the part of the defendant, nor does it require that the defendant communicate an intent to use violence. Thus, under the categorical lens, which considers only the least culpable conduct necessary to satisfy the offense of conviction, bank robbery does not have as an element the "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of the ACCA's elements clause.

This case presents a question of exceptional importance regarding federal criminal law that requires this Court's guidance. Having a clear and consistent definition of the intimidation element of federal bank robbery is crucial to both the government and the defendant in prosecutions for that offense, and it will assist the courts in efficiently administering the law. Moreover, correctly understanding the scope of the intimidation

element of federal bank robbery is at the heart of determining whether the offense qualifies for numerous categorically-defined federal sentencing enhancements for crimes involving intentional violence, including the harsh mandatory minimum sentence required by the ACCA. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses committed by "intimidation" as violent felonies under the ACCA and, respectively, that trial courts appropriately instruct juries regarding the correct offense elements of bank robbery.

Statement Of The Case

Petitioner William Floyd Moore is serving a 180-month mandatory minimum prison sentence imposed under the ACCA. The ACCA enhancement was premised on the district court's finding that Mr. Moore's three prior convictions for federal unarmed bank robbery in violation of 18 U.S.C. § 2113(a) qualified as violent felonies. Mr. Moore requests certiorari to correct the Ninth Circuit's deviation from established federal law by holding that the elements of § 2113(a) categorically involve the use, attempted use, or threatened use of violent force.

A. In 2013, Mr. Moore Was Sentenced To A 180-Month Mandatory Minimum Sentence Under The ACCA Because His Three Prior Bank Robbery Convictions Were Deemed To Be Violent Felonies.

In 2011, a federal grand jury in Oregon charged Mr. Moore by separate indictments with one count of unarmed bank robbery, in violation of 18 U.S.C. § 2113(a), and one count of felon in possession of a firearm, in violation 18 U.S.C. § 922(g). CR 9, No. 3:11-

cr-00375-BR (D. Or.) (Bank Robbery Indictment); CR 1, No. 3:11-cr-00379-BR (D. Or.) (Firearm Indictment).[1]

A violation of § 922(g) generally carries a maximum term of ten years in prison. 18 U.S.C. § 924(a)(2). The ACCA, however, mandates a 15-year minimum sentence and a maximum of life in prison for a felon who has "three previous convictions . . . for a violent felony or for a serious drug offense." 18 U.S.C. § 924(e)(1). The indictment against Mr. Moore specifically alleged a violation of § 924(e) and identified as predicates one prior conviction for New Mexico burglary and three prior convictions on separate occasions for federal unarmed bank robbery. CR 1, No. 3:11-cr-00379-BR.

Mr. Moore entered into a plea agreement covering both dockets in which the parties promised to jointly recommend that he receive the mandatory minimum 180-month sentence for the ACCA offense. CR 31 at 3-4, No. 3:11-cr-00379-BR. The parties also agreed that Mr. Moore should receive a low-end guideline sentence of 151 months on the bank robbery charge, to run consecutive to a 24-month sentence for violating supervised release in a separate case. CR 31 at 3-4, No. 3:11-cr-00379-BR. The aggregate 175-month sentence on those dockets would run concurrently with the ACCA sentence. *Id.*

On December 4, 2013, the sentencing court imposed sentence in accordance with the parties' agreement. CR 62, No. 3:11-cr-00375-BR (Judgment); CR 55, No. 3:11-cr-

[1] The citation "CR" refers to the court record from the federal district court's electronic case filing system in the specified case numbers.

00379-BR (Judgment). Mr. Moore did not appeal his conviction or sentence in either docket.

B. In 2016, Mr. Moore Sought 28 U.S.C. § 2255 Relief Following The Due Process Ruling In *Johnson v. United States*.

On June 26, 2015, this Court held that imposing an enhanced sentence under the residual clause of the ACCA violates the Constitution's guarantee of due process. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). This Court subsequently held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016).

Represented by counsel, Mr. Moore filed identical 28 U.S.C. § 2255 motions to vacate, set aside, or correct sentence in both of his dockets on June 20, 2016. CR 66, No. 3:11-cr-00375-BR (Motion to Vacate); CR 59, No. 3:11-cr-00379-BR (Motion to Vacate). Mr. Moore argued that, in light of *Johnson*, federal bank robbery does not qualify as a violent felony because the residual clause is now unconstitutional and the offense does not have an element of violent force in order to satisfy the elements clause. Because Mr. Moore's two concurrent sentences were imposed together as a "package," he asserted that both sentences should be vacated and subject to a full resentencing. CR 73 at 2, No. 3:11-cr-00375-BR (Memorandum in Support) (citing *United States v. Handa*, 122 F.3d 690, 691-92 (9th Cir. 1997)).

On December 7, 2017, the district court denied relief in a single order filed in both dockets, finding federal bank robbery to be a violent felony under the ACCA's elements

clause. CR 86, No. 3:11-cr-00375-BR (Opinion and Order). The district court denied a certificate of appealability. *Id.*

Mr. Moore timely appealed to the Ninth Circuit from the denial of § 2255 relief and filed motions for certificate of appealability in the appellate court on January 11, 2018. CR 87, No. 3:11-cr-00375-BR (Notice of Appeal); CR 80, No. 3:11-cr-00379-BR (Notice of Appeal); AR 2.[2]

On November 6, 2018, the Ninth Circuit issued identical unpublished orders in both dockets denying certificates of appealability. AR 4. The orders state:

> The request for a certificate of appealability (Docket Entry Nos. 2 and 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), *cert. denied*, No. 18-5022, 2018 WL 3223705 (Oct. 1, 2018).

AR 4.

Mr. Moore is currently serving his 180-month sentence at FCI Sheridan with a projected release date of October 28, 2024.

Argument

The denial of Mr. Moore's 28 U.S.C. § 2255 motions asserting the unconstitutionality of his ACCA sentence rested on the district court's finding that, even without the residual clause, federal bank robbery under 18 U.S.C. § 2113(a) remains a

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[2] The citation "AR" refers to the appellate record from the Ninth Circuit's electronic case filing system in Case Nos. 17-35986 and 17-35989 (9th Cir.). The documents and orders filed in both cases are identical in relevant part, and so a single AR citation is used.

violent felony under the ACCA's elements clause. The Ninth Circuit denied a certificate of appealability, finding that issue not reasonably debatable based on its opinion in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018). But *Watson*, like other similar circuit court authority, deviated from controlling precedent interpreting the intimidation element of federal bank robbery. As authoritatively construed by this Court in *Carter*, and as applied by the circuits for decades, intimidation need not be intentional, nor does it require a communicated intent to use violence. Thus, the bank robbery statute does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of the ACCA's elements clause.

A. The Categorical Approach Determines Whether An Offense Is A Violent Felony Under The ACCA.

To determine if an offense qualifies as a "violent felony" under the ACCA, courts must use the categorical approach to discern the "minimum conduct criminalized" by the statute at issue through an examination of cases interpreting and defining that minimum conduct. *Moncrieffe v. Holder*, 569 U.S. 184 (2013). This Court first set forth the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and refined the analysis in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). The narrow categorical approach mandated by this precedent requires courts to "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Mathis*, 136 S. Ct. at 2256.

Because the categorical approach is concerned only with what conduct the offense necessarily involves, 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.

B. Intimidation Within The Meaning Of 18 U.S.C. § 2113(a) Is Not A Match For The Definition Of A Violent Felony In The ACCA's Elements Clause.

The least culpable conduct criminalized by federal bank robbery is not a match for at least two of the requirements of the ACCA's elements clause. First, the ACCA requires *purposeful* violent conduct. But this Court has held that bank robbery is a general intent crime, and the circuits have not applied any culpable mens rea to the intimidation element. Second, the ACCA requires that physical force be *violent* in nature. But bank robbery by intimidation does not require a communicated intent to use violence.

1. The ACCA's Elements Clause Requires A Purposeful Threat Of Physical Force, Whereas Bank Robbery By Intimidation Is A General Intent Crime That Does Not Require Any Intent To Intimidate.

In *Leocal v. Ashcroft*, this Court held that the "use of physical force against the person or property of another" within the meaning of the § 924(c) crime of violence definition, which is analogous to the ACCA's violent felony definition, means "active employment" of force and "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. 1, 9 (2004); *see also Begay v. United States*, 553 U.S. 137,

145 (2008) (holding that the ACCA's residual clause requires purposeful conduct), *overruled by Johnson*, 135 S. Ct. at 2560; *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (applying *Leocal* to the ACCA and stating that "the use of force must be intentional, not just reckless or negligent"). In the Ninth Circuit's *Watson* decision, the court considered and rejected the defendant's claim that the mental state for bank robbery is not a match for the crime of violence definition in § 924(c)(3)(A) because the statute permits a defendant's conviction "if he only negligently intimidated the victim." 881 F.3d at 785. Citing *Carter*, the court concluded that federal bank robbery "must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Id.*

Watson's conclusion that bank robbery by intimidation requires a knowing threat of force is inconsistent with the standard announced by this Court in *Carter* and with the manner in which the circuits have consistently construed the intimidation element of bank robbery outside the categorical approach context. In *Carter*, the question under consideration was whether § 2113(a) implicitly requires an "intent to steal or purloin," which is an element of the related offense of bank larceny in § 2113(b). 530 U.S. at 267. In evaluating that question, this Court emphasized that the presumption in favor of scienter would allow it to read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269. Thus, the Court recognized that § 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.* at 269. But the Court found no basis to impose a specific intent requirement on § 2113(a). *Id.* at 268-69. Instead, the Court determined that "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 (emphasis in original).

Under *Carter*, a defendant must be aware that he or she is engaging in the actions that constitute a taking by intimidation, but the government need not prove that the defendant knows the conduct is intimidating. That reading of *Carter* finds support in circuit precedent both pre-dating and post-dating the opinion. Prior to *Carter*, the Ninth Circuit defined "bank robbery by intimidation" as "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). This definition attached the willful mens rea solely to the "taking" element of bank robbery, not the "intimidation" element.

Similarly, in *United States v. Foppe*, the Ninth Circuit rejected a jury instruction that would have required the jury to conclude that the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The court never suggested that the defendant must know the actions are intimidating. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."). Similarly, in *United States v. Hopkins*, the Ninth Circuit held that the defendant used "intimidation" by simply presenting a demand note stating, "Give me all your hundreds,

fifties and twenties. This is a robbery," even though he spoke calmly, was clearly unarmed, and left the bank "in a nonchalant manner" without having received any money. 703 F.2d 1102, 1103 (9th Cir. 1983). The Court approved a jury instruction that stated 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. *Id.*

Other circuit decisions reflect the same interpretation of intimidation that focuses on the objectively reasonable reaction of the victim rather than the defendant's intent. The Fourth Circuit held in *United States v. Woodrup* that "[t]he 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." 86 F.3d 359, 363 (4th Cir. 1996) (quoting *United States v. Wagstaff*, 865 F.2d 626, 627 (4th Cir. 1989)). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Woodrup*, 86 F.3d at 364. The Eleventh Circuit held in *United States v. Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d 1240, 1244 (11th Cir. 2005).

The Eighth Circuit case of *United States v. Yockel*, decided three years after *Carter*, leaves no question on the matter: there, the court expressly stated that a jury may not consider the defendant's mental state, even as to knowledge of the intimidating character of the offense conduct. 320 F.3d 818, 823-24 (8th Cir. 2003). In *Yockel*, the defendant was

attempting to withdraw $5,000 from his bank account, but the teller could not find an account in his name. 320 F.3d at 820. Eventually, after searching numerous records for an account, the defendant told the teller, "If you want to go to heaven, you'll give me the money." *Id.* at 821. The teller became fearful, and "decided to give Yockel some money in the hopes that he would leave her teller window." *Id.* She gave Yockel $6,000 and asked him, "How's that?" The defendant responded, "That's great, I'll take it." *Id.*

The government filed a motion in limine seeking to preclude evidence of the defendant's mental health offered to demonstrate his lack of intent to intimidate. *Id.* at 822. The defendant argued that the evidence was relevant because bank robbery requires knowledge with respect to the intimidation element of the crime. *Id.* The district court disagreed and decided "to exclude mental health evidence in its entirety as not relevant to any issue in the case." *Id.* The Eighth Circuit affirmed. *Id.* at 823. Citing *Foppe*, the court held that intimidation is measured under an objective standard, without regard to the defendant's intent, and is satisfied "if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the [defendant's] acts[.]" *Id.* at 824 (internal quotation marks and alterations omitted). Accordingly, the court decided that "the *mens rea* element of bank robbery [does] not apply to the element of intimidation[.]" *Id.*

Thus, *Carter* and circuit precedent together establish that a defendant is guilty of bank robbery by intimidation within the meaning of § 2113(a) so long as the defendant engages in a knowing act that reasonably instills fear in another, without regard to the defendant's intent to intimidate. As so defined, intimidation cannot satisfy the element

clause's mens rea standard. In *Elonis v. United States*, this Court explained that engaging in a knowing act is not equal to knowing the character of that act. 135 S. Ct. 2001, 2011 (2015). In *Elonis*, the Court considered as a matter of statutory interpretation whether a culpable mental state is required for a threatening communication to be punishable under 18 U.S.C. § 875(c). Relying on the "basic principle" that "wrongdoing must be conscious to be criminal," the Court concluded that a culpable mental state must "apply to the fact that the communication contains a threat." *Elonis*, 135 S. Ct. at 2009, 2011.

The government in *Elonis* had argued that a defendant's statements should be punished as threats as long as "he himself knew the contents and context" of the statements and "a reasonable person would have recognized that [they] would be read as genuine threats." 135 S. Ct. at 2011. The Supreme Court made clear that this proposed mental state could not be characterized "as something other than a negligence standard" because it ultimately relied on whether a "reasonable person," not the defendant, would view the conduct as harmful:

> [T]he fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence standards often incorporate "the circumstances known" to a defendant. . . . Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. . . . That is a negligence standard.

Id. (citation omitted).

Comparing the mens rea standard for intimidation articulated in *Foppe* and *Yockel* with *Elonis* demonstrates that the intimidation prong of bank robbery requires no more than

a negligent threat of harm. As in *Elonis*, the fact that § 2113(a) requires a defendant "to actually know the words of and circumstances surrounding" the taking by intimidation "does not amount to a rejection of negligence." *Id.* Rather, a threat is committed only negligently when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" *Id.* Although § 2113(a) requires that a defendant have knowledge of his or her actions, it leaves the question of whether the actions are intimidating to be judged solely by what a reasonable person would think, not what the defendant thinks. As in *Elonis*, "[t]hat is a negligence standard." 135 S. Ct. at 2011.

This Court should intervene to affirm the minimal mental state requirement applicable to federal bank robbery by intimidation, as confirmed by *Carter* and decades of circuit precedent. Because intimidation is satisfied when a reasonable person, not the defendant, would view the defendant's conduct as intimidating, § 2113(a) does not meet the ACCA's requirement of purposeful violence.

2. The ACCA's Elements Clause Requires A Threatened Use Of Violent Physical Force, Whereas Bank Robbery By Intimidation Does Not Require That A Defendant Communicate Any Intent To Use Violence.

Even if § 2113(a) proscribed a sufficient mens rea for the "intimidation" element of the offense, the statute does not require a threatened use of *violent* physical force. In *Stokeling v. United States*, this Court confirmed that "physical force" within the meaning of the ACCA must be "'*violent* force—that is, force capable of causing physical pain or injury to another person.'" 139 S. Ct. 544, 553 (2019) (quoting *Johnson v. United States*,

559 U.S. 133, 140 (2010) ("*Johnson 2010*")) (emphasis in original). Physical force does not include mere offensive touching. *Id.* In *Watson*, the Ninth Circuit reasoned that, because "intimidation" in 18 U.S.C. § 2113(a) must be objectively fear-producing, it satisfies the degree of force required under the ACCA's force clause. 881 F.3d at 785 ("[A] 'defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury.'" (quoting *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017))). That reasoning was in error because it is the content of a communication that defines a threat, not the reaction of the victim.

As this Court recognized in *Elonis*, the common definition of threat typically requires a "*communicated* intent to inflict harm or loss on another[.]" 135 S. Ct. at 2008 (quoting BLACK'S LAW DICTIONARY 1519 (8th ed. 2004)) (emphasis added). In *United States v. Parnell*, the Ninth Circuit reasoned that an uncommunicated "willingness to use violent force is not the same as a threat to do so." 818 F.3d 974, 980 (9th Cir. 2016). Thus, a threat depends on the content of a communication, not the victim's reaction. The fact that conduct might provoke a reasonable fear of bodily harm does not prove that the defendant "communicated [an] intent to inflict harm or loss on another." *Elonis*, 135 S. Ct. at 2008.

Intimidation does not require a communicated threat. For purposes of § 2113(a), intimidation can be (and frequently is) accomplished by a simple demand for money, without regard to whether the bank teller is afraid. *See, e.g.*, *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991) ("[T]he threat implicit in a written or verbal demand for money is sufficient evidence to support [a] jury's finding of intimidation."); *Hopkins*, 703

F.2d at 1103 ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]' are not required for a conviction for bank robbery by intimidation." (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980))).

In *United States v. Ketchum*, the defendant handed a teller a note that read: "These people are making me do this," and then orally stated, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." 550 F.3d 363, 365 (4th Cir. 2008). The defendant's statement did not evidence a threat of force by the defendant against a victim (the defendant stated that he feared violence himself), but it was still held sufficient to qualify as "intimidation" under § 2113(a). *Id.*

Similarly, in *United States v. Lucas*, a defendant's bank robbery conviction was upheld where he placed several plastic shopping bags on the counter along with a note that read: "Give me all your money, put all your money in the bag," and then repeated, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). And, in *United States v. Smith*, the court found sufficient evidence to affirm the defendant's bank robbery conviction where the defendant told the teller he wanted to make a withdrawal, and when the teller asked if that withdrawal would be from his savings or checking account, he stated, "No, that is not what I mean. I want to make a withdrawal. I want $2,500 in fifties and hundreds," and then yelled, "you can blame this on the president, you can blame this on whoever you want." 973 F.2d 603, 603 (8th Cir. 1992).

Although each of these cases involved circumstances that were deemed objectively fear-producing, the defendants made no written, oral, or physical threats to use "violent" force if the tellers refused. A simple demand for money does not implicitly carry a threat of violence because not all bank robbers are prepared to use violent force to overcome resistance. *See Parnell*, 818 F.3d at 980 (rejecting a similar argument that a purse snatching necessarily implies a threat of violent force and reasoning that, "[a]lthough some [purse] snatchers are prepared to use violent force to overcome resistance, others are not").

Nor is bank robbery by intimidation limited to those cases where a defendant makes a verbal demand for money. It also includes taking money without a demand and without physical force capable of causing any pain or injury. In *United States v. Slater*, for example, the defendant simply entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but the defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what he was doing. 692 F.2d 107, 107-08 (10th Cir. 1982); *accord United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (Table) (affirming finding of intimidation where the defendant reached over the counter and took money from an open teller drawer after asking the teller for change). Those bank robberies involved no violence, nor any communicated intent to use violence, beyond that used in a typical purse snatching.

As the *Watson* court recognized, "intimidation" under § 2113(a) is not defined by the content of any communication, but rather by the reaction that the defendant's conduct might objectively produce. 881 F.3d at 785. However, conduct can be frightening, yet still

not contain a threat. Accordingly, the circuits have strayed from precedent in concluding that intimidation requires a threat of violent force. *See, e.g.*, *Watson*, 881 F.3d at 785.

C. The Court Of Appeals Did Not Correctly Apply This Court's Standards For Issuance Of A Certificate Of Appealability Because It Precluded Consideration Of Issues That Are Reasonably Debatable And That Warrant Full Briefing And A Decision On The Merits.

The standard for issuing a certificate of appealability (COA) requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, this Court held that a COA should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." 529 U.S. 473, 478 (2000). A petitioner meets that threshold upon demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *accord Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

To meet this "threshold inquiry," *Slack*, 529 U.S. at 482, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (alteration in original) (internal quotation marks omitted). The petitioner need not show that relief must be granted. *Miller-El*, 537 U.S. at 337 (reaffirming the holding in *Slack* "that a COA does not require a showing that the appeal will succeed").

The questions raised in this petition meet the certificate of appealability threshold because they are debatable by reasonable jurists and they deserve encouragement to proceed further. In *United States v. Dawson*, for example, the district court judge granted a certificate of appealability on virtually identical arguments to those presented here, reasoning that the Ninth Circuit's decision in *Watson* stands in tension with this Court's mens rea opinion in *Carter* and with earlier Ninth Circuit precedent regarding the intimidation element of bank robbery. 300 F. Supp. 3d 1207, 1210-12 (D. Or. 2018). *Dawson* demonstrates that at least one reasonable jurist has debated whether *Watson* deviated from established precedent.

Moreover, the issues presented here warranted fuller exploration in the circuit court because they address critical issues of national importance regarding the circuits' inconsistent standards for defining the elements of federal bank robbery. By denying a certificate of appealability, the Ninth Circuit inappropriately cut off viable challenges grounded in Supreme Court and circuit authority.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 4th day of February, 2019.

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