NO.

IN THE SUPREME COURT OF THE UNITED STATES

TOMMY RAY MCADOO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Rene L. Valladares
Federal Public Defender
*Cristen C. Thayer
Assistant Federal Public Defenders
Office of the Federal Public Defender
411 E. Bonneville, Ste. 100
Las Vegas, Nevada 89101
(702) 388-6577
Cristen _Thayer@fd.org
*Counsel for Petitioner

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Question Presented For Review

The Fourth, Fifth, Ninth, and Eleventh Circuits broadly interpret "intimidation" as used in the federal bank robbery statute for sufficiency purposes, affirming convictions for non-violent conduct that does not involve the use, attempted use, or threats of violent physical force. Yet, when applying the crime of violence categorical analysis, these same circuits find "intimidation" always necessarily involves the use, attempted use, or threats of violent force.

Should this Court accept review to resolve the conflicting "intimidation" interpretations the Circuits have given the federal bank robbery statute?

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Petition for Certiorari

Petitioner Tommy McAdoo petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Ninth Circuit.

Order Below

The Ninth Circuit Court of Appeals order holding McAdoo's prior conviction for federal bank robbery under 18 U.S.C. § 2113(a) qualifies as a crime of violence under the Sentencing Guidelines is attached in the Appendix: *United States v. McAdoo*, No. 17-10361, Dkt. 41 (9th Cir. Dec. 19, 2018).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in McAdoo's case on December 19, 2018. *See* Appendix. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely under Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

The federal bank robbery statute at 18 U.S.C. § 2113(a) 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
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> 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

This Court has long attempted to unify the "crime of violence" definition in federal criminal statutes. The Sentencing Guidelines' Career Offender enhancement at U.S.S.G. § 4B1.2 uses language to define "crime of violence" that is materially similar to the so-called "elements clause" found in federal criminal statutes. The district court enhanced McAdoo's sentence under the Career Offender provision by finding federal bank robbery meets the elements clause in § 4B1.2. The Ninth Circuit affirmed based on its precedent holding bank robbery meets the elements clause of a criminal statute mandating consecutive prison sentences when a defendant takes an action with a firearm during and in relation to any crime of violence, 18 U.S.C. § 924(c).

Numerous Circuit courts continue to erroneously hold that federal bank robbery by intimidation—conduct that does *not* require any specific intent or any violent force—qualifies as a crime of violence under the elements clause. The "intimidation" decisions among the Fourth, Fifth, Ninth, and Eleventh Circuits rest on an incorrect categorical analysis. For sufficiency of the evidence purposes, these circuits broadly interpret "intimidation" to affirm convictions for non-violent conduct that *does not* involve the use, attempted use, or threatened use of violent force. Yet for categorical analysis of the elements clause, these same circuits also find "intimidation" *always involves* the use, attempted use, or threats of violent force. Whether "intimidation" involves the use, attempted use, or threatened use of violent force requires this Court's guidance.

This case thus presents a question of exceptional importance for those whose sentences are enhanced by bank robbery under the Career Offender guideline elements clause or any other similarly worded elements clause found in criminal statutes. Certiorari is necessary to ensure all circuits appropriately exclude offenses committed by "intimidation" as crimes of violence under the elements clause.

Related Cases Pending in this Court

The Federal Public Defender for the District of Nevada has recently filed petitions for writs of certiorari regarding 18 U.S.C. § 924(c)'s elements clause, federal armed bank robbery at 18 U.S.C. § 2113(a) and (d), and 28 U.S.C. § 2255 in the following cases: *Matthew Hearn v. United States*, 18-7573 (U.S.); *Rodney Landingham v. United States*, No. 18-7543 (U.S.); and *Hector Cirino, et al v. United States*, 18-7680 (U.S.).

Statement of the Case

McAdoo, a 78-year old man suffering from multi-vessel coronary artery disease, is serving almost 16 years in prison for a federal armed bank robbery conviction because the district court found his prior federal bank robbery conviction qualified as a crime of violence under the Sentencing Guideline Career Offender

provision. U.S.S.G. § 4B1.1.[1] Specifically, the district court found that two of McAdoo's prior convictions legally qualified as "crimes of violence:" a 1990 conviction for bank robbery under 18 U.S.C. § 2113, and a 2000 conviction for assault with a dangerous weapon under 18 U.S.C. § 113. U.S.S.G. §4B1.2(a).

With two predicates, the Career Offender enhancement requires that nine levels be added to the defendant's offense level. U.S.S.G. § 4B1.1(b). The Career Offender enhancement also requires the sentencing court to automatically place the defendant's criminal history at category VI. U.S.S.G. § 4B1.1(b). For McAdoo, this resulted in a 188 to 235 month advisory imprisonment range. PSR ¶ 70. The Career Offender enhancement more than *tripled* McAdoo's Guideline range, which would have been 51 to 63 months without the enhancement.

The district court sentenced McAdoo to 188 months followed by three years of supervised release. The Ninth Circuit affirmed, relying on *United States v. Watson*, 881 F.3d 782 (9th Cir.). *Watson* held that federal bank robbery and federal armed bank robbery qualify as a crime of violence under 18 U.S.C. § 924(c)'s "elements clause" crime of violence definition. 881 F.3d at 787. Section 924(c)'s elements clause provides an offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

[1] The district court applied the 2016 Sentencing Guidelines Manual, incorporating all guideline amendments, to determine McAdoo's offense level.

Argument

I. Certiorari is necessary to provide the proper interpretation of "intimidation" as used in the federal bank robbery statute to determine whether it requires proof of an intentional threat of violent physical force necessary to meet the Career Offender elements clause.

Section 4B1.1 of the Sentencing Guidelines provides for an enhanced base offense level if the defendant qualifies as a "career offender." The Guidelines classify a defendant as a career offender if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

"Crime of violence" is defined in U.S.S.G. § 4B1.2. *Id.* cmt. n.1. At the time of McAdoo's sentencing on August 2, 2017, U.S.S.G. § 4B1.2 provided:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that–
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5485(a) or explosive material as defined in 18 U.S.C. § 841(c).

§ 4B1.2(a). Subsection (1) of this definition is known as the elements clause. Courts refer to subsection (2) as the enumerated offenses clause.

McAdoo's sentence rests on findings that federal bank robbery under 18 U.S.C. § 2113(a) is a crime of violence under the Career Offender elements clause. But the federal 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" that the elements clause requires.

A. The categorical approach determines whether an offense is a crime of violence under the Career Offender provision.

To determine if an offense qualifies as a "crime of violence," 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, 184 (2013. This Court first set forth the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and provided further clarification in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). The categorical approach 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.

In this categorical analysis, 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. *Stokeling v. United States*, 139 S.Ct. 544, 552-53 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson 2010*")). In *Johnson 2010*, 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. 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). Federal bank robbery fails to meet either requirement because it does not require violent physical force or specific intent.

B. Federal bank robbery does not require intentional violent physical force.

Federal bank robbery can be committed "by force and violence, or by intimidation, . . . or . . . by extortion." 18 U.S.C. § 2113(a). Applying the categorical approach, the least egregious conduct the statute covers is intimidation.

The "intimidation" decisions among the Fourth, Fifth, Ninth, and Eleventh Circuits, however, incorrectly apply the categorical analysis. These circuits broadly interpret "intimidation" for sufficiency purposes, affirming convictions including non-violent conduct that *does not* involve the use, attempted use, or threats of violent force. Yet, notwithstanding their broad definition of "intimidation," these same circuits also find "intimidation" *always involves* the use, attempted use, or threats of violent force for the crime of violence categorical analysis. The circuits cannot have it both ways.

The finding that "intimidation" meets the elements clause is erroneous. To illustrate why, it is necessary to review the problematic bank robbery decision currently controlling the Ninth Circuit on which it relied to deny McAdoo relief: *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). *See* Appendix.

Watson failed to acknowledge this Court's prior case law interpreting and applying the federal bank robbery statute. *Watson*'s holding thus creates numerous conflicts with controlling Supreme Court precedent as well as inter-circuit conflicts. Resolution of this conflict with Supreme Court precedent is necessary to bring comity to cases adjudicating whether "intimidation" is sufficient to establish a crime of violence for purposes of federal sentencing enhancements.

1. Intimidation does not require the use or threat of violent physical force.

In *Watson*, the Ninth Circuit held bank robbery by intimidation "requires at least 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson* [*2010*] standard.'" 881 F.3d at 785 (citing *Johnson 2010*, 559 U.S. 133). But *Watson* failed to acknowledge this Court's teachings that: (1) violent force must be "capable" of "causing physical pain or injury" to another, *Stokeling*, 139 S. Ct. at 553; and (2) violent force must be physical force, rather than "intellectual force or emotional force." *Id.* at 552 (quoting *Johnson 2010*, 559 U.S. at 138).

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 emotional or intellectual impact on a bank teller, it does not

require threatening or inflicting physical pain or injury. Yet *Watson* assumed an act of intimidation necessarily involve the willingness to use violent physical force and assumed further that a willingness to use violent physical force is the equivalent of threatening to use violent physical force. These assumptions are fallacious for at least three reasons.

First, a willingness to use violent physical force is not the same as a threat to do so. Indeed, the Ninth Circuit previously acknowledged "[a] willingness to use violent force is not the same as a threat to do so." *Parnell*, 818 F.3d at 980 (finding Massachusetts armed robbery statute does not qualify as a violent felony under the ACCA). The government argued in *Parnell* that anyone who robs a bank harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. The Ninth Circuit rejected the government's position, holding "[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 address this recognized distinction.

Second, intimidation does not require a willingness to use violent physical force. For example, this Court notes that robbery by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway*, 526 U.S. at 11. While *Holloway* addressed intimidation in relation to the federal carjacking statute (18 U.S.C. § 2119), the federal bank robbery statute similarly prohibits a taking committed "by intimidation." 18 U.S.C. § 2113(a). *Watson* failed to honor or address this recognized definition.

Third, even where a defendant is willing to use violent physical force, an intimidating act does not require such willingness be communicated to the victim. A victim's reasonable fear of bodily harm does not prove that a defendant "communicated [an] intent to inflict harm or loss on another." *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015) (defining "threat"). Indeed, an examination of bank robbery affirmances reveals numerous cases where the facts did not include any intimidation by threatened violent physical force.

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." *Id.* at 248.

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.* 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.*

Critically, if the defendants in *Lucas* and *Hopkins* were ever "willing" to use or threaten to use violent force, they did nothing to communicate or express that willingness to their victims. The defendants never threatened to use violent physical force against any victim. *Lucas* and *Hopkins* demonstrate how bank robbery does not require the use or threatened use of "violent" physical force.

Other federal circuit affirmances of bank robbery convictions also illustrate that a threatened use of violent physical force is not required to sustain a conviction. 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. *Slater*, 692 F.2d at 107-08 (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).

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.* Paradoxically, the Fourth Circuit has *also* held for crime of violence purposes that "intimidation"

necessarily requires the threatened us of violent physical force. *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir.), *cert. denied*, 137 S. Ct. 164 (2016).

The Fifth Circuit does not require any explicit threat and instead permits conviction for robbery by intimidation when a reasonable person would feel afraid even where there was no weapon, no verbal or written threat, and when the victims were not actually afraid. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987). And yet again, the Fifth Circuit *also* inconsistently 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, 1304 (11th Cir. 2018).

The Fourth, Fifth, Ninth and Eleventh Circuits all apply a non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction. But when determining whether bank robbery is a crime of violence, these same circuits find "intimidation" *always* requires a defendant to threaten the use of violent physical force. These inconsistent definitions of "intimidation" cannot stand.

Certiorari is necessary to direct circuits that "intimidation" as used in the federal bank robbery statute does not require the *threatened* use of violent physical force sufficient to satisfy the Career Offender elements clause.

2. Federal bank robbery is a general intent crime.

The elements clause requires the use of violent force must 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's conduct is not required to be intentionally intimidating.

This Court holds § 2113(a) "contains no explicit *mens rea* requirement of any kind." *Carter*, 530 U.S. at 267. This Court held in *Carter* that federal bank robbery does not require an "intent to steal or purloin." *Carter*, 530 U.S. at 267. 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.'" *Carter*, 530 U.S. 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)," but found no basis to impose a specific intent in § 2113(a). *Carter*, 530 U.S. 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 § 924(c)'s 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. The Fourth Circuit holds "[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." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (citation omitted). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Id.* The Eleventh Circuit similarly held in *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 at 1244. Likewise, the Eighth Circuit holds that a jury may not consider the defendant's mental state as to the intimidating character of the offense conduct. *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing Foppe with approval).

As a general intent crime, an act of intimidation can be committed negligently, which is insufficient to qualify as an intentional use of violent force. As

this Court explained in *Elonis*, a threat is negligently committed when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" *Elonis*, 135 S. Ct. at 2011. A statute encompasses a negligence standard when it measures harm as viewed from the perspective of a hypothetical "reasonable person," without requiring subjective awareness of the potential for harm. *Id.* For bank robbery purposes, juries find "intimidation" based on the victim's reaction, not the defendant's intent, thus intimidation can be negligently committed. Because the federal bank robbery statute does not require an intentional mens rea, the statute does not define a crime of violence.

An express threat or threatening movement is not required to demonstrate robbery by intimidation. *Hopkins*, 703 F.2d at 1103. But to satisfy § 924(c)'s elements clause, a threat of physical force "requires some outward expression or indication of an intention to inflict pain, harm or punishment." *Parnell*, 818 F.3d at 980. The federal bank robbery statute has no such requirement.

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 correctly instruct circuit courts that general intent "intimidation," as used in the federal bank robbery statute, does not require an intentional threat of violent physical force, and therefore is not a crime of violence under the Career Offender elements clause.

C. The federal bank robbery statute is indivisible and not a categorical crime of violence under the Career Offender provision.

The final step of categorical analysis determines if an 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.* The federal bank robbery statute is overbroad, indivisible, and not a crime of violence.

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)). These sources do not establish that § 2113(a) is divisible. Rather, each indicates the

exact opposite: (1) force and violence, (2) intimidation, and (3) extortion are indivisible means of satisfying a single element.

First, *Watson* did not explain how *Eaton* supports divisibility. That is because it does not. *Eaton* clarified the elements required for a bank robbery conviction under § 2113(a): "Bank robbery under section 2113(a) is defined, in relevant part, 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). *Eaton* recognizes "force and violence," "intimidation," and "extortion" are three ways to take property. It follows under *Eaton* that "extortion" is a means of committing a § 2113(a) robbery, as is "intimidation." Accordingly, § 2113(a) is indivisible as to "force and violence," "intimidation," and "extortion."

Second, *Watson*'s reliance on *Jennings* is no more persuasive. *Jennings* addressed the application of a guideline enhancement to the facts of a bank robbery conviction. *Jennings*, 439 F.3d at 612. *Watson* did not include an explanatory parenthetical when citing *Jennings*. *Watson*, 881 F.3d at 786. It is therefore unclear what part of *Jennings*'s analysis *Watson* relied on to support its position that § 2113(s) sets forth alternative elements.

Watson may have been relying on *Jennings*'s statement that "§ 2113(a) 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. But this statement is not

instructive to the divisibility analysis. Every statute, whether divisible or indivisible, "covers" the alternatively worded methods of incurring liability. That a statute "covers" multiple courses of conduct says nothing about whether those courses of conduct are means or elements. The Iowa robbery statute in *Mathis*, for example, "covered" robberies committed in a building, structure, or vehicle, yet *Mathis* concluded those locations were means, not elements. 136 S. Ct. at 2250 (clarifying standard for divisibility analysis).

Thus, none of the sources *Watson* cited establish "extortion" is divisible from "force and violence" and "intimidation."

Watson also failed to cite *Gregory*, 891 F.2d at 734, which demonstrates § 2113(a) is indivisible. In *Gregory*, the Ninth Circuit 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. Bank *larceny*, *Gregory* reasoned, requires "a specific intent element which need not be proved in the bank robbery context." *Id.* To support this 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).

As the statute's wording—with the use of the disjunctive "or"—suggests, *Gregory* notes "force and violence," "intimidation," and "extortion" are three separate ways of taking property, each of which is independently sufficient to prove a robbery. *Gregory*'s discussion of these three alternatives as ways to commit the single offense of bank robbery suggests that each alternative is a means.

Other circuits are in accord. 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 Fourth Circuit, treats "force and violence," "intimidation," and "extortion" as separate means of committing § 2113(a) bank robbery. *United States v. Williams*, 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 definitively 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).

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.

Furthermore, the text of § 2113(a) supports the finding that bank robbery is indivisible. First, as this Court held in *Mathis*, "[i]f statutory alternatives carry different punishments, then . . . they must be elements." 136 S. Ct. at 2256. Nothing in § 2113's statutory text suggests it criminalizes different offenses depending on whether the underlying conduct was committed "by force and violence, or by intimidation, . . . or . . . by extortion." 18 U.S.C. § 2113(a). The statute provides one punishment—a person who violates § 2113(a) "[s]hall be fined under this title or imprisoned not more than twenty years, or both." *Id.* Regardless of whether a defendant takes property by force and violence, or by intimidation, or

by extortion, he is subject to the same penalty. *See id.* A key divisibility indicator this Court identified in *Mathis* is absent here.

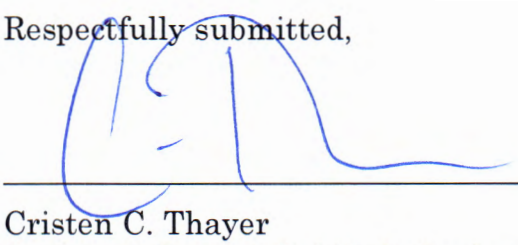
Second, the statute's history confirms bank robbery is a single offense that can be accomplished "by force and violence," "by intimidation," or "by extortion." Until 1986, § 2113(a) covered only obtaining property "by force and violence" or "by intimidation." *See Holloway*, 309 F.3d at 651. A circuit 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. Since § 2113(a) is indivisible, the analysis is limited to the categorical approach. Under the categorical approach, federal bank robbery is overbroad and not a crime of violence under the Career offender provision.

Conclusion

For the above reasons, McAdoo requests the Court grant a Writ of Certiorari.

Respectfully submitted,



Cristen C. Thayer
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Cristen_Thayer@fd.org