No. 19-7067

IN THE SUPREME COURT
OF THE UNITED STATES

MICHAEL BAIRD JORDAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Reply Brief In Support Of Petition For Writ Of Certiorari

Petitioner Michael Baird Jordan asks this Court to grant a writ of certiorari to review the holding of the Ninth Circuit Court of Appeals that federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) qualifies as a "crime of violence" under the force clause of 18 U.S.C. § 924(c)(3)(A). The government's brief in opposition does not contest that this issue is one of critical importance that can lead to decades of unlawful incarceration for a single defendant, let alone the systemic impacts of the question presented given the frequency with which the issue arises. Instead, the government posits that further review is unnecessary.

In fact, the government's brief in opposition highlights the need for this Court's intervention by establishing that the circuits are entrenched in a position that creates internal inconsistencies between the definition of the "intimidation" element of federal bank robbery for conviction purposes and the element's definition for purposes of applying the categorical approach. In the conviction context, courts give "intimidation" its broadest meaning, requiring neither a communicated threat of violence nor any culpable mens rea. In the context of the categorical approach, to apply drastic sentencing enhancements, the courts pivot to hold that "intimidation" is narrow enough to satisfy the crime of violence definition in 18 U.S.C. § 924(c)(3)(A), which requires the purposeful use, attempted use, or threatened use of violent force. The inconsistent approach puts the government in an unfair "heads I win; tails you lose" position.

The government's brief underscores this inconsistency by supporting its position solely with cases decided in the vacuum of the categorical approach. But the circuits have deviated from this Court's clear instruction that the categorical approach requires courts to consider the outer contours of the statute's reach based on judicial application of the statute. For decades, courts have applied § 2113(a) to convict and incarcerate defendants for conduct that does not involve violent force or a knowing threat of violence. The government's reliance on categorical approach cases that ignore the statute's real-world application are unfaithful to this Court's controlling precedent.

This Court should grant certiorari to correct the course of the circuits given the exceptional importance of the question, the frequency with which it arises, and the need to correct the lower courts' application of the categorical approach.

The present case is an excellent vehicle for the Court's review of this pure legal question. The issue goes to the validity of Mr. Jordan's § 924(c) conviction, not just his sentence. The conviction itself carries collateral consequences requiring a remedy, and, in any event, this Court has made clear that the existence of concurrent sentences does not insulate an unlawful sentence from review.

A. The Circuits' Entrenched Position That Federal Bank Robbery Is A "Crime Of Violence" Under § 924(c)(3)(A) Is Inconsistent With The Expansive Conduct Punished As "Intimidation" Under 18 U.S.C. § 2113(a).

The government's brief in opposition to certiorari underscores the divide between precedent in the conviction context and precedent applying the categorical approach by

citing only the latter in support of its position that bank robbery is a crime of violence. But this Court has clearly instructed that the categorical approach is concerned with the least culpable conduct criminalized, which asks how courts have actually applied the law. Contrary to the government's position, as actually applied, the "intimidation" element of § 2113 encompasses a mere demand for money or nonviolent snatching. Likewise, as actually applied, defendants need not have any culpable *mens rea* as to the "intimidation" element of § 2113, because the courts have only required conduct that is objectively fear-producing, regardless of the defendant's intent.

1. The Categorical Approach Requires Courts To Consider The Full Reach Of A Criminal Statute, Including The Least Culpable Conduct Actually Criminalized.

This Court's instructions for applying the categorical approach are clear and consistent on the two key points at issue here. First, courts applying the categorical approach must consider the outer contours of the statute and can find a categorical match only when the least culpable conduct punished satisfies the federal definition. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("[W]e must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." (internal quotation marks and alterations omitted)); *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (same).

Second, courts cannot look solely to the title or text of the statute, but must consider how it has actually been applied. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007);

see also Johnson v. United States, 559 U.S. 133, 138 (2010) (*Johnson 2010*) (holding that state court interpretations of a statute are controlling). When there is "a realistic probability, not a theoretical possibility, that the [government] would apply [the] statute to conduct that falls outside the generic definition of a crime," then there can be no categorical match. *Duenas-Alvarez*, 549 U.S. at 193. A crime is not a categorical match when the defendant can "point to his own case or other cases in which the . . . courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

The government's argument that the "intimidation" element of armed bank robbery matches the crime of violence definition in § 924(c)(3)(A) ignores these two crucial points. The government, after securing convictions based on precedent applying § 2113(a) expansively to nonviolent conduct, now advocates under the categorical approach that the law is narrow and requires a knowing threat of violence. But the judicial application of § 2113(a) to nonviolent conduct without a culpable *mens rea* controls.

2. The Circuits Have Erred In Holding Under The Categorical Approach That Armed Bank Robbery By Intimidation Requires A Threat Of Violence.

Citing cases decided in the categorical approach context, the government says that armed bank robbery by intimidation necessarily requires proof of the "threat of force." *Johnson*, Br. in Opp. at 9.[1] It does not. Instead, in sufficiency of the evidence cases (*i.e.*,

[1] "*Johnson*, Br. in Opp." refers to the government's Brief in Opposition in *United States v. Johnson*, No. 19-7079 (S. Ct.), which the government adopted by incorporation

the cases that actually define the contours of a crime), the courts of appeal have held that a mere demand for money—uncoupled from any use, attempted use, or threatened use of force—constitutes intimidation. *See, e.g.*, *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983); *United States v. Lucas*, 963 F.2d 243, 244 (9th Cir. 1992). The Eleventh Circuit holds that the mere act of laying across a bank counter and stealing from a till constitutes intimidation—even though the defendant said nothing. *See United States v. Kelly*, 412 F.3d 1240, 1244-45 (11th Cir. 2005). The Fourth Circuit has made clear that any request for money will suffice. *See, e.g.*, *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (sufficient evidence of bank robbery by intimidation where defendant gave teller a note that read "[t]hese people are making me do this" and that "[t]hey are forcing me and have a gun. Please don't call the cops. I must have at least $500."). The Tenth Circuit has reached similar results. *See United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (saying "shut up" to teller in response to question while stealing from bank sufficient evidence of intimidation). These cases demonstrate that the least serious conduct encompassed by bank robbery by intimidation does not categorically require the use, attempted use, or threatened use of force.

The government argues that these cases all involve "implicit . . . threats of force or violence." *Johnson*, Br. in Opp. at 11. But the cases actually relieve the prosecutor of any

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into its opposition in the present case. The Brief in Opposition filed by the government in the present case is referred to as "*Jordan*, Br. in Opp."

burden to prove a threat of force by holding that *any* demand for money or interaction with a teller in the course of stealing can produce fear and so constitutes a threat. *See United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002) (holding that "unequivocal written and verbal demands for money to bank employees are a sufficient basis for a finding of intimidation" under § 2113(a)). In *United States v. Armour*, for example, the Seventh Circuit held that federal bank robbery "inherently contains a threat of violent physical force" because "[a] bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force." 840 F.3d 904, 909 (7th Cir. 2016). 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," as necessary for a communication to qualify as a threat. *Elonis v. United States*, 135 S. Ct. 2000, 2008 (2015). When a fact is merely presumed, rather than proven beyond a reasonable doubt, it is not an element sufficient to satisfy the categorical approach. *See United States v. Mathis*, 136 S. Ct. 2243 (2016) (explaining reasons for limiting categorical approach to elements submitted to the jury and proven beyond a reasonable doubt).

While distancing itself from precedent actually applying § 2113(a) to nonviolent conduct, the government asserts that interpreting "intimidation" to require the threatened use of force "is consistent with the text and history of the bank-robbery statute." *Johnson*, Br. in Opp. at 9. That argument is misplaced in the categorical approach analysis. When courts apply the categorical approach, they must ask whether the elements of the underlying offense *as elaborated by case law* necessarily require the prosecutor to prove

the use, attempted use, or threatened use of force. *Johnson*, 559 U.S. at 138. The question is whether there is a "realistic probability"—based on actual dispositions—that a crime encompasses nonviolent conduct. *Gonzalez*, 549 U.S. at 193. While some of the circuits have accepted the government's invitation to focus on the legislative history underlying the bank robbery statute, *see, e.g.*, *United States v. Carr*, 946 F.3d 598, 602-604 (D.C. Cir. 2020), that is a misguided approach to categorical analysis.

Focusing on a Senate Judiciary Committee report concerning the 1984 amendment to § 924(c), the government further contends that Congress wanted bank robbery to fall within the definition of a crime of violence set forth in § 924(c). *Johnson*, Br. in Opp. at 15 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983)). This contention again misses the mark. For one thing, the Senate Report is not the statutory text, and, when it wants to, Congress knows precisely how to create a sentencing enhancement for a specific crime. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (listing "burglary, arson, or extortion" as violent felonies for purposes of the armed career criminal enhancement); *see also Stokeling v. United States*, 139 S. Ct. 544, 564 (2019) (Sotomayor, J., dissenting) ("Congress could, at any time, []enumerate robbery . . . if it so chose."); *cf.* 18 U.S.C. § 3559(c)(2)(F)(i) (listing "robbery (as described in section 2111, 2113, or 2118) as a serious violent felony for purposes of the three-strikes statute).

More importantly, the Senate Report reflects Congress's recognition that bank robbery qualified as a crime of violence under the former version of § 924(c), *when the statute included the residual clause*. From the Senate Report's perspective, bank robbery

was a crime of violence due to its "extremely dangerous" nature, not because one of its elements necessarily required the prosecutor to prove the use, attempted use, or threatened use of force. S. Rep. No. 225, 98th Cong., 1st Sess. 312-313; *see also Stokeling*, 139 S. Ct. at 563-64 (Sotomayor, J., dissenting) (noting that potential disqualification of robbery offenses as violent felonies "would stem just as much (if not more) from the death of the residual clause as from" the Court's definition of physical force). The Senate Report does not support the conclusion that bank robbery satisfies the force clause, and it fails to rebut the many cases applying § 2113(a) to nonviolent conduct.

3. The Circuits Have Erred In Holding Under The Categorical Approach That Armed Bank Robbery Requires Knowing Intimidation.

The government next claims that armed bank robbery necessarily requires proof of purposeful violence, as required by the force clause, because a defendant must *know* that his conduct is intimidating. *Johnson*, Br. in Opp. at 17-18. That is not correct. In his petition, Mr. Jordan cited numerous circuit court opinions holding that the element of intimidation is judged by an objective, "reasonable reaction of the listener" standard, not by the defendant's subjective intent. Pet. at 13-14. The government claims those cases "merely establish [that] Section 2113(a) does not require proof of a specific[ ] inten[t] to intimidate." *Johnson*, Br. in Opp. at 19. But the reasoning of the courts negates a requirement of knowledge just as much as it negates specific intent.

In *United States v. Foppe*, for example, the Ninth Circuit approved a jury instruction that attached no *mens rea* to the intimidation element of § 2113(a). 993 F.2d 1244 (9th Cir.

1993). The court reasoned that, under a general intent standard, the conduct itself is all that is required:

> Unarmed bank robbery, as defined in section 2113(a), is a general intent crime, not a specific intent crime. The court should not instruct the jury on specific intent *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*. . . . "The determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions." . . . Whether Foppe specifically intended to intimidate Del Rosario is irrelevant. Because [t]he government need only prove that the taking of money was by intimidation," . . . the jury instructions in this case adequately described the elements of the offense.

993 F.2d at 1451 (emphasis added) (internal citations omitted). *Foppe* rejects *any* subjective mental state for intimidation, not just specific intent.

Just as in *Foppe*, the Eleventh Circuit's rejection of specific intent in *Kelly* was grounded in the conclusion that intimidation is judged objectively, negating any subjective mental state element: "Whether a particular act constitutes intimidation is viewed objectively, . . . and 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.

And in *United States v. Woodrup*, the Fourth Circuit similarly reasoned that specific intent is not required because intimidation is judged by the reasonable reaction of the listener:

> [N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . We therefore reaffirm that the intimidation element of § 2113(a) is satisfied if "an ordinary person in the teller'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, 364 (4th Cir. 1996).

While the government seizes on the fact that *Foppe*, *Kelly*, and *Woodrup* rejected specific-intent claims, the government fails to acknowledge that the courts interpreted the intimidation element to require *no culpable mens rea*, because knowledge of the conduct itself was sufficient for conviction. By focusing on conduct, not intent, the statute's reach expanded as the government sought lower barriers to conviction. This is contrary to the government's current premise that courts all along have required defendants to know their conduct was intimidating.

In any event, the Eighth Circuit's decision in *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003), is explicit in its rejection of even a knowing *mens rea* with respect to intimidation. In that case, the defendant sought to introduce mental health evidence to rebut the government's proof that he knew his conduct was intimidating. The Eighth Circuit affirmed the district court's conclusion that the evidence was "not relevant to any issue in the case." *Id.* Even where the mental state at issue was knowledge, the Eighth Circuit declined to impose that requirement and declared: "[T]he *mens rea* element of bank robbery [does] not apply to the element of intimidation[.]" *Id.* Thus, the government's claim that intimidation requires subjective intent is inconsistent with how courts have actually applied the statute.

Notwithstanding the wall of authority interpreting intimidation as a solely objective element, the government maintains that a defendant must "also [know] that his actions were objectively intimidating." *Johnson*, Br. in Opp. at 18 (citing *United States v. McNeal*, 818

F.3d 141, 155 (4th Cir. 2016), and *Carr*, 946 F.3d at 606). But it is telling that the only case law supporting that position are categorical approach cases. The omission of any conviction context precedent requiring evidence that a defendant knew his actions were intimidating speaks to the divide in authority—expansive interpretation of intimidation to secure convictions, narrow interpretation to fall within the crime of violence definition. The same statutory term cannot mean different things in different contexts. *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2005), and *United States v. Thompson/Center Arms Co.*, 505 U.S. 505, 517-18 (1992)).

The government's and the circuits' error likely stems from conflating a defendant's knowledge of his actions with knowledge of the incriminating character of those actions, the same mistake this Court corrected in *Elonis*, 135 S. Ct. at 2011 ("[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). As a general intent crime, § 2113(a) requires proof "that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation." *See Carter v. United States*, 530 U.S. 255, 268 (2000). While *Carter* required knowing conduct (the *actus reus*), it did not require a defendant to know the conduct's incriminating character. Certainly, the circuits applying *Carter* to affirm convictions for federal bank robbery have not required any such knowledge, concluding that intimidation is an objective standard without any requirement of a culpable *mens rea*.

This Court should grant certiorari to resolve the inconsistencies in the analysis of the lower courts. The expansive conviction context precedent demonstrates that bank robbery by intimidation is not a crime of violence under § 924(c)(3)(A).

B. The Question Is Exceptionally Important.

The question presented in this case warrants review not only because of the critical inconsistencies in the lower courts' treatment of the "intimidation" element of federal bank robbery, but also because of the frequency with which the issue arises and the severity of the consequences. Bank robbery is one of the most commonly charged federal crimes. The erroneous decisions below bind sentencing courts to impose mandatory consecutive terms on defendants charged with violating § 924(c) in connection with bank robbery and armed bank robbery. They do not just affect exercises of discretion or even the calculation of a defendant's advisory range under the Sentencing Guidelines. Instead, they bind judge's hands to impose lengthy consecutive sentences.

And the error does not end with § 924(c). Because § 924(c)'s force clause is materially indistinguishable from the force clause in 18 U.S.C. §§ 16 and 924(e), the circuit courts' error will result in erroneous sentencing under the Armed Career Criminal Act, erroneous classifications of bank robbery and armed bank robbery under the criminal code's general crime-of-violence provision, and erroneous immigration consequences as well.

Granting certiorari will provide the Court with a critical opportunity to correct the circuits' misguided categorical approach analysis. The circuits have gone astray from the

core principles articulated in *Moncrieffe*, *Duenas-Alvarez*, *Johnson (2010)*, and *Mathis*. The circuits' analysis has allowed a presumed fact to be treated as the equivalent of an element proven beyond a reasonable doubt. The circuits have ignored expansive judicial construction that permits convictions under § 2113(a) for nonviolent conduct. And the circuits have fostered an unfair dual construction of a single statute that differs depending on the context in which the statute is considered.

The circuit courts' errors offend against core categorical approach principles that this Court has not hesitated to enforce. Certiorari is warranted.

C. This Case Provides An Excellent Vehicle For Resolving The Question Presented Because The Preserved Issue Is Solely One Of Law And The Outcome Will Determine The Validity Of Mr. Jordan's 18 U.S.C. § 924(c) Conviction.

Contrary to the government's claims, this case provides an excellent vehicle to resolve whether federal bank robbery by "intimidation" is a crime of violence under § 924(c)(3)(A). The question is a pure issue of law that was fully litigated in the lower courts, and this Court's determination of the legal issue will determine the lawfulness of Mr. Jordan's § 924(c) conviction and sentence.

The government cites to *Supervisor v. Stanley*, 105 U.S. 305 (1883), for the proposition that, due to a concurrent life sentence imposed under 18 U.S.C. § 3559(c), Mr. Jordan's challenge to the consecutive life sentence imposed under § 924(c) presents an abstract question of no practical effect. *Jordan*, Br. in Opp. at 9-10. This Court has long since rejected the concurrent sentence doctrine, holding that "the existence of concurrent

sentences does not remove the elements necessary to create a justiciable controversy." *Benton v. Maryland*, 395 U.S. 784, 78 (1969). The sentences in this case are not concurrent in any event—§ 924(c) binds courts to impose mandatory consecutive sentences.

Each conviction carries independent consequences, including, at a minimum, the separate fee assessment required by 18 U.S.C. § 3013. *See Ray v. United States*, 481 U.S. 736 (1987). In *Ray*, the lower court declined to review a count because the term of imprisonment and special parole in question ran concurrently with another count. This Court granted certiorari "to review the role of the concurrent sentence doctrine in federal courts." *Ray*, 481 U.S. at 737. Addressing the original version of § 3013, enacted in 1982, the Court noted that each count carries a separate monetary charge. The Court held, "Since petitioner's liability to pay this total depends on the validity of his three convictions, the sentences are not concurrent." *Id.*

Resolving the question presented in this petition will determine the validity of Mr. Jordan's count of conviction for violating 18 U.S.C. § 924(c), for which he received a separate fee assessment of $100.00, and for which he received a mandatory consecutive life sentence. The outcome of this case is not insignificant to Mr. Jordan. He has an abiding interest in ensuring that the judgment against him reflects only lawful convictions proved by sufficient evidence.

In addition to the reasoning of *Ray*, allowing the error to remain uncorrected could impact Mr. Jordan in the future if the law under 18 U.S.C. § 3559(c) were to change to his benefit. In the past several years, Congress has rolled back other draconian sentencing

measures that constrained judicial discretion with mandatory minimum terms of imprisonment. In the Fair Sentencing Act of 2010, for example, Congress modified mandatory minimum drug statutes for cocaine base, and Congress applied those changes retroactively in the First Step Act of 2018. In the event that Congress takes similar measures to permit a second look at the sentences imposed under the "three strikes" statute, the invalid § 924(c) conviction should not stand in the way of relief.

Mr. Jordan has judiciable and practical interests in establishing the invalidity of his conviction and sentence, making this case an excellent vehicle for resolving the important question presented.

Conclusion

For the foregoing reasons, and those set forth in the Petition, the Court should issue a writ of certiorari.

Dated this 8th day of May, 2020.

/s/ Elizabeth G. Daily
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