No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRYAN MARK JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Petition for Certiorari

Petitioner Bryan Johnson petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Ninth Circuit.

Order Below

The Ninth Circuit Court of Appeals' order denying appellate relief for Mr. Johnson's motion to vacate under 28 U.S.C. § 2255 is attached in the Appendix: *Johnson v. United States*, No. 18-35672, Dkt. 20 (9th Cir. 2019).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Mr. Johnson's case on September 25, 2019. *See* Appendix A. 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 Fifth Amendment to the United States Constitution provides:

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

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

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

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

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

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

Reason for Granting the Writ

This Court should grant certiorari to resolve a question of exceptional importance: whether federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) can be a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) when the offense fails to require any intentional use, attempted use, or threat of violent physical force.

Circuit courts continue to erroneously hold that federal armed bank robbery by intimidation – conduct that does *not* require any specific intent or any violent force – qualifies as a crime of violence under § 924(c)'s elements clause. The "intimidation" decisions among the Fourth, Fifth, Ninth, and Eleventh Circuits rest on an incorrect categorical analysis. For sufficiency analysis, 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 § 924(c) analysis, 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 convicted under 18 U.S.C. § 924(c), which mandates consecutive prison sentences for the use of a firearm during a crime of violence. Certiorari is necessary to ensure all circuits appropriately exclude offenses committed by "intimidation" as crimes of violence under § 924(c).

Related Cases Pending in this Court

Counsel is aware of no related cases currently pending before the Court.

Statement of the Case

After pleading guilty to four counts—bank robbery (in violation of 18 U.S.C. § 2113(a)), armed bank robbery (in violation of 18 U.S.C. § 2113(a), (d)), unlawful possession of a firearm (in violation of 18 U.S.C. § 922(g)), and possessing a firearm in furtherance of the "crime of violence" of armed bank robbery (in violation of 18 U.S.C. § 924(c)(1)(A))—Mr. Johnson was sentenced to a combined sentence of 272 months in prison. The district court reached this sentence, in part, after concluding that it needed to sentence Mr. Johnson to a mandatory consecutive term of 84-months on the § 924(c) count. This part of Mr. Johnson's sentence is based

on the district court's erroneous view that armed bank robbery qualifies as a crime of violence under § 924(c)'s residual clause.

The problem is that Mr. Johnson's federal armed bank robbery conviction is not a crime of violence under 18 U.S.C. § 924(c)'s elements clause because it can be committed by intimidation without specific intent to harm. No use, attempted use, or threatened use of violent physical force was required for conviction. As such, the conviction can only be argued to qualify as predicate crimes of violence under § 924(c)'s now-void residual clause. Mr. Johnson requests certiorari to correct the Ninth Circuit's deviation from established federal law on the requirements for § 924(c)'s elements clause.

Argument

I. Certiorari is necessary to provide the proper interpretation of "intimidation" as used in the federal armed bank robbery statute to determine whether it requires proof of an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c)(3)(A).

Mr. Johnson's 18 U.S.C. § 924(c) conviction and sentence rests on the finding that federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) is a crime of violence. But the federal armed 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. 18 U.S.C. § 924(c)(3)(A). The federal armed bank robbery statute does not therefore meet the elements clause of § 924(c)(3)(A).

A. The categorical approach determines whether an offense is a crime of violence under 18 U.S.C. § 924(c).

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 (2013); *Almanza-Arenas v. Lynch*, 815 F.3d 469, 482 (9th Cir. 2016) (en banc). 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 for a statute to meet § 924(c)'s elements clause. *Stokeling v. United States*, __ S. Ct. __, 2019 WL 189343 at *6 (Jan. 15, 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. In *Stokeling*, this Court recently interpreted *Johnson 2010*'s "violent physical force" definition to encompass physical force "potentially" causing physical pain or injury to another. __ S. Ct. __, 2019 WL 189343 at *8. Second, the use of force must also be intentional and not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016). Federal armed bank robbery fails to meet either requirement because it does not require violent physical force or specific intent.

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

Federal armed 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 § 924(c) analysis. The circuits cannot have it both ways.

The finding that "intimidation" meets § 924(c)'s 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 Mr. Johnson 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 convictions and mandatory, consecutive sentencing penalties.

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 "potentially" "causing physical pain or injury" to another, *Stokeling*, __ S. Ct. __, 2019 WL 189343 at *8; and (2) violent force must be physical force, rather than "intellectual force or emotional force." *Id.* at *6 (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." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) (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 v. United States*, 526 U.S. 1, 11 (1999). 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 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. *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing).

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) (en banc).

The Fourth, Fifth, Eleventh, and Ninth 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 armed bank robbery statute does not require the threatened use of violent physical force sufficient to satisfy § 924(c)'s elements clause.

2. Federal armed bank robbery is a general intent crime.

The § 924(c) 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 armed 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 v. United States*, 530 U.S. 255, 267 (2000). This Court held in *Carter* that federal bank robbery does not require an "intent to steal or purloin." *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.* 364. 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 armed 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 armed 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 armed bank robbery

statute, does not require an intentional threat of violent physical force, and therefore is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

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

Mr. Johnson's underlying convictions are *armed* bank robbery convictions that require proof a defendant "use[d] a dangerous weapon or device." 18 U.S.C. § 2113(d). This fact does not render Mr. Johnson's convictions crimes of violence under 18 U.S.C. § 924(c)'s elements clause for at least three reasons.

First, *Watson* did not address the armed element of armed bank robbery other than to summarily state "[a] conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery. Thus, an armed bank robbery conviction under § 2113(a) and (d) cannot be based on conduct that involves less force than an unarmed bank robbery requires." 881 F.3d at 786 (citations omitted). Armed bank robbery can thus be committed by intimidation, just as bank robbery, which fails to meet the element's clause requirements of violent physical force. *See* Section I.B.1. *infra*.

Second, this Court applies a subjective standard, from the point of view of the victim, permitting armed bank robbery convictions where the victim's reasonable belief as to the nature of the gun used in the robbery determines whether the "weapon" was dangerous or deadly because its display "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986).

Relying on *McLaughlin*, the Ninth Circuit affirms armed bank robbery convictions that do not involve actual weapons. In *United States v. Martinez-Jimenez*, for example, the defendant entered a bank and ordered people in the lobby to lie on the floor while his partner took cash from a customer and two bank drawers. 864 F.2d 664 (9th Cir. 1989). The defendant "was holding an object that eyewitnesses thought was a handgun" but was in fact a toy gun he purchased at a department store. *Id.* at 665. His partner testified that "neither he nor [the defendant] wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives." *Id.* Yet, the defendant was guilty of armed bank robbery even where: (1) he did not "want[] the bank employees to believe [he] had a real gun," and (2) he believed anyone who perceived the gun accurately would know it

was a toy. Such a defendant does not intend to threaten violent force. His threat to use force is at most reckless. But recklessness is insufficient to qualify an offense as a crime of violence. *Leocal*, 543 U.S. at 12-13.

Other federal circuits also hold armed bank robbery includes the use of fake guns. "Indeed, every circuit court considering even the question of whether a fake weapon that was never intended to be operable has come to the same conclusion" that it constitutes a dangerous weapon for the purposes of the armed robbery statute. *United States v. Hamrick*, 43 F.3d 877, 882-83 (4th Cir. 1995); *See, e.g.*, *United States v. Arafat*, 789 F.3d 839, 847 (3d Cir. 1998) (affirming toy gun as dangerous weapon for purposes of § 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993) (same); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990) (same).

Third, this Court in *McLaughlin* held an unloaded or even a toy gun is a "dangerous weapon" for purposes of § 2113(d) because "as a consequence, it creates an immediate danger that a violent response will ensue." 476 U.S. at 17-18. Thus, circuit courts including the Ninth Circuit

define a "dangerous weapon" with reference to not only "its potential to injure people directly" but also the risk that its presence will escalate the tension in a given situation, thereby inducing other people to use violent force. *Martinez-Jimenez*, 864 F.2d at 666-67. In other words, the armed element does not require the defendant to use a dangerous weapon violently against a victim. Rather, the statute can be satisfied where the defendant's gun (even if a toy) makes it more likely that a police officer will use force in a way that harms a victim, a bystander, another officer, or even the defendant. *Id.*

A statute does not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone other than the defendant. Given the broad definition of a "dangerous weapon or device," armed bank robbery does not satisfy the § 924(c) elements clause. *Watson* does not address or reconcile this issue.

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

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 armed 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 *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1994), 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 Third Circuit agrees. *United States v. Askari*, 140 F.3d 536, 548 (3rd Cir. 1998) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery.").

The Fourth Circuit, in *United States v. Williams*, treated "force and violence," "intimidation," and "extortion" as separate means of committing § 2113(a) bank robbery. 841 F.3d 656 (4th Cir. 2016). "As its text makes clear, subsection 2113(a) can be violated in two distinct ways: (1) bank robbery, which involves taking or attempting to take from a

bank by force and violence, intimidation, or extortion; and (2) bank burglary, which simply involves entry or attempted entry into a bank with the intent to commit a crime therein." 841 F.3d at 659. Bank robbery, the Fourth Circuit wrote, has a single "element of force and violence, intimidation, or extortion." *Id.* at 660.

And the Sixth Circuit, without 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 armed bank robbery is overbroad and not a crime of violence under § 924(c).

Conclusion

For the above reasons, Mr. Johnson respectfully asks that the Court grant a Writ of Certiorari.

Respectfully submitted this 23rd day of December, 2019.

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