No. 19-7764

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL TYRONE SIMPSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

United States Sentencing Guidelines

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL TYRONE SIMPSON,
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- v. -

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Introduction

In his petition for a writ of certiorari, Mr. Simpson asked this Court to resolve two questions. First, he asked the Court to reconcile the expansive definition of federal bank robbery set forth in *Carter v. United States*, 530 U.S. 255 (2000), and *Elonis v. United States*, 135 S. Ct. 2001 (2015), with the narrower definition that courts of appeals use to determine whether a sentencing enhancement applies. As Mr. Simpson explained, *Carter* and *Elonis* interpret "intimidation" under 18 U.S.C. § 2113(a) broadly, requiring neither an intent to place the victim in fear nor a threat of violent physical force. But in determining whether federal bank robbery satisfies the "crime of violence" definition at 18 U.S.C. § 924(c)(3)(A), the courts of appeals define "intimidation" more narrowly, holding that bank robbery involves the intentional "use, attempted use, or threatened use" of violent force.

In a separate question presented, Mr. Simpson also asked the Court to decide once and for all whether its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidated the residual clause of the mandatory Sentencing Guidelines that existed prior to the Court's 2005 decision in *United States v. Booker,* 543 U.S. 220 (2005).

The government's brief in opposition ("Gov. BIO") does not deny that these issues, if left unresolved, could lead to decades of unlawful incarceration for thousands of defendants. Instead, the government claims that no review is necessary because the element of "intimidation" in federal bank robbery categorically qualifies as the threatened use of force. But the government ignores multiple cases where defendants were convicted of bank robbery without an intentional threat of violent physical force. The government also characterizes the eight-two circuit split over the mandatory Guidelines as "shallow," ignoring that it renders relief a matter of geographic happenstance. Because judges, attorneys, and petitioners deserve clarity on these high stakes issues, the Court should grant certiorari.

Argument

I. The Court should clarify the definition of "intimidation" for purposes of the federal bank robbery statute.

In his petition, Mr. Simpson first asserted that the element of "intimidation" in federal bank robbery does not categorically involve the "use, attempted use, or threatened use" of physical force under 18 U.S.C. § 924(c)(3)(A), for two reasons. First, the threat of force in § 924(c)(3)(A) requires an *intent* to communicate a threat

to another, while bank robbery requires no such *mens rea*. Second, § 924(c)(3)(A) requires a threat of *violent* physical force, while federal bank robbery requires, at most, a request for money. The government fails to overcome these arguments.

A. The Court should clarify whether federal bank robbery requires an *intentional* threat.

In his petition, Mr. Simpson pointed to *Carter*'s holding that "the presumption in favor of scienter demands only that we read subsection [2113(a)] as requiring proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime." 530 U.S. at 268 (emphasis in original). This means that to be convicted of federal bank robbery, defendants need not subjectively intend (or even know) that their actions are putting another in fear. All the statute requires is that "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996).

The Court confirmed this in *Elonis* by repeating the long-standing principle that where a statute includes no explicit *mens rea*, courts should apply "only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." 135 S. Ct. at 2010. (quotations omitted). Using *Carter* as an example, the Court explained that the *mens rea* of federal bank robbery under § 2113(a) was an intent to steal—not necessarily an intent to threaten the victim. *Id.* Because this intent to steal separated wrongful conduct from innocent conduct, the statute's lack of any explicit scienter language meant that courts could not apply a *mens rea* to other language in the statute, such as "intimidation." So in the

last two decades, this Court has twice confirmed that federal bank robbery under § 2113 does not require prosecutors to prove beyond a reasonable doubt that a defendant intended to threaten the victim.

The government claims that bank robbery necessarily requires proof of an intentional threat because a defendant must *know* his conduct is intimidating.[1] *Johnson* BIO at 17–18. But that is not consistent with how courts of appeals have been applying the law. In *United States v. Foppe*, 993 F.2d 1444 (9th Cir. 1993), for example, the Ninth Circuit approved a jury instruction that attached no *mens rea* to the intimidation element of § 2113(a). The court reasoned that, under a general intent standard, "[t]he determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions." *Id*. at 1451 (quotations omitted). Thus, the question of "[w]hether Foppe specifically intended to intimidate [the victim] is irrelevant." *Id*.

As in *Foppe*, the Eleventh Circuit held that intimidation for purposes of the bank robbery statute is judged objectively because "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005). And the Fourth Circuit has held that "nothing in the statute even remotely suggests that the defendant must have intended to intimidate," and thus, "the intimidation element of § 2113(a) is

[1] The government does not actually make these arguments in its BIO—rather it incorporates the arguments it made in a similar case. *See* Gov. BIO 10 (stating that Mr. Simpson's arguments "lack merit for the reasons explained at pages 9 to 20 of the government's brief in opposition in [*United States v. Johnson*, No. 19-7079]"). Mr. Simpson cites this incorporated brief as "*Johnson* BIO."

satisfied … whether or not the defendant actually intended the intimidation." *Woodrup*, 86 F.3d at 364.

The Eighth Circuit's decision in *United States v. Yockel*, 320 F.3d 818, 823–24 (8th Cir. 2003), is even more explicit. 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 such a requirement, declaring: "[T]he *mens rea* element of bank robbery [does] not apply to the element of intimidation." *Id.*

Despite this authority, the government maintains that a defendant must *know* "that his actions were objectively intimidating." *Johnson* BIO at 18. But the only examples the government uses to support this statement are sentencing cases that apply the categorical approach, rather than trial cases that considered the sufficiency of the evidence. *See Johnson* BIO at 18. Yet it is these sufficiency-of-the evidence cases that actually define the contours of a crime and show the elements a prosecutor must prove. So under if the government were correct, a person could be convicted under a broad interpretation of the elements and sentenced under a narrow interpretation of the elements—rather than applying the same interpretation throughout. This disparity underscores the critical need to ensure that the courts of appeals are applying the same interpretation of "intimidation" at every stage of a defendant's criminal proceedings.

B. The Court should clarify whether federal bank robbery requires a threat of *violent* force.

Mr. Simpson also pointed out that federal bank robbery does not require a threat of "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 138 (2010). For instance, in sufficiency-of-the-evidence cases the courts of appeals 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 act of laying across a bank counter and stealing from a teller constitutes intimidation—even though the defendant said nothing. *See Kelly*, 412 F.3d at 1244–45. And the Fourth Circuit has found intimidation where the defendant gave the teller a note that read, "These people are making me do this … [t]hey are forcing me and have a gun. Please don't call the cops. I must have at least $500." *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008). *See also 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)). These cases demonstrate that the least serious conduct encompassed by bank robbery by intimidation requires only a request for money—not the threatened use of violent force.

The government argues that these cases all involve "implicit" threats of force and thus do not show that the statute is broader than § 924(c)(3)(A). *Johnson* BIO

at 11. But the government cites no authority holding that an "implicit" threat of violent force is an *element* of bank robbery. And it is only *elements* that count for purposes of the categorical approach. *See Mathis v. United States*, 136 S. Ct. 2243 (2016) (limiting the categorical approach to elements submitted to the jury and proven beyond a reasonable doubt). Because Mr. Simpson has shown a "realistic probability" that a defendant may be convicted of federal bank robbery without threatening violent force, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), bank robbery is not a categorical match for § 924(c)(3)(A).

Focusing on a Senate Judiciary Committee report concerning the 1984 amendment to § 924(c), the government nevertheless contends that Congress *wanted* bank robbery to fall within the definition of a crime of violence set forth in § 924(c). *Johnson* BIO at 15 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983)). But the Senate Report is not the statutory text. And Congress' intent is irrelevant when Mr. Simpson can show as a practical matter that federal courts actually convict defendants under the broader definition of "intimidation." *See Duenas-Alvarez*, 549 U.S. at 193.

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. *See United States v. Davis,* 139 S. Ct. 2319 (2019) (holding that the residual clause of § 924(c)(3)(B) is void for vagueness). From the Senate Report's perspective, bank robbery was a crime of violence due to its "extremely dangerous" nature, not because its elements 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 v. United States*, 139 S. Ct. 544, 563–64 (2019) (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). So the Senate Report carries little—if any—persuasive value.

Because the circuit courts' interpretation of "intimidation" in categorical approach sentencing cases directly contradicts *Carter* and *Elonis*, as well the circuit courts' own sufficiency-of-the-evidence trial cases, the Court should grant certiorari to ensure that the elements of federal bank robbery are being properly and consistently applied.

II. The Court should also grant review on the constitutionality of the mandatory Guidelines' "residual clause."

On the second question presented, the government asserts that the Court should deny review of Mr. Simpson's claim that the residual clause of former U.S.S.G. § 4B1.2 is void for vagueness.[2] The government claims that the eight-to-two circuit split presented here is "shallow" and that the pool of individuals who could benefit from its resolution is shrinking. *Gipson* BIO at 12.

But neither of these arguments presents a good reason to deny review. First, the government does not refute that the First and Seventh Circuits have ruled in

[2] Again, the government does not make these arguments in its BIO but incorporates arguments it made in a similar case. *See* Gov. BIO at 10–11 (adopting its arguments from Gipson v. United States, No. 17-8637) (herein "*Gipson* BIO").

favor of similarly-situated petitioners. *See Cross v. United States*, 892 F.3d 288 (7th Cir. 2018); *Moore v. United States*, 871 F.3d 72 (1st Cir. 2018). And district courts within the First Circuit continue to grant relief, undermining the government's attempt to portray this as a lopsided split. *See, e.g., Boria v. United States*, 427 F. Supp. 3d 143, 149 (D. Mass. 2019). As one judge wrote, mandatory Guidelines cases are "a testament to the arbitrariness of contemporary habeas law, where liberty can depend as much on geography as anything else." *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (Martin, J., dissenting).

Moreover, any appearance of uniformity masks deep divisions in the lower courts, as demonstrated by judges who continue to express doubt over the supposedly "settled" treatment of this question. *See*, *e.g.*, *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. July 26, 2019) (Berzon, J., concurring) (calling on the Ninth Circuit to revisit its decision, then almost a year old, and opining that "the Seventh and First Circuits have correctly decided this question"); *United States v. London*, 937 F.3d 502, 513-14 (5th Cir. 2019) (Costa, J., concurring) ("[A]t a minimum, an issue that has divided so many judges within and among circuits, and that affects so many prisoners, 'calls out for an answer'") (quoting *Brown*, 139 S. Ct. at 14 (Sotomayor, J., dissenting)). Only this Court can put an end to this judicial doubt.

Second, on a question as important as this one, the alleged "shallowness" of the split should not prevent this Court from addressing the issue. After all, the Court granted certiorari in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), in

the face of a six-to-one split—eventually siding with the minority view. And last year in *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019), the Court granted review despite the absence of *any* circuit split, ultimately reversing every single circuit that had ruled on the issue. Thus, the Court should grant certiorari to resolve this issue on the merits.

III. Mr. Simpson's case is an excellent vehicle to resolve these important issues.

The government does not dispute that both of the questions presented are of critical importance and can lead to decades of unlawful incarceration. Nor does the government deny that Mr. Simpson timely preserved both issues at every stage of litigation. Instead, the government contends that Mr. Simpson's case itself would be an unsuitable vehicle for two independent reasons: 1) the residual clause of the career offender Guideline was "not vague as applied" to Mr. Simpson; and 2) the petition was a second or successive one that was "subject to additional limitations" under 28 U.S.C. 2255(h). Gov. BIO at 12–13.

But neither of these contentions makes Mr. Simpson's case an unsuitable vehicle for review. First, the government argues that Mr. Simpson's offense would have qualified as a "crime of violence" even without the residual clause because it constitutes a "robbery," one of the examples listed in the commentary to U.S.S.G. § 4B1.2 at the time of his sentencing. Gov. BIO at 12–13. But the commentary itself has no freestanding authority—rather, it is the *text* of § 4B1.2 that defines a "crime of violence." *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (holding that courts may not follow commentary that is "inconsistent" with the Guideline itself).

Here, the text of the Guideline listed four—and only four—types of convictions that qualified as *per se* crimes of violence: "burglary of a dwelling, arson, or extortion, [or a crime that] involves use of explosives." U.S.S.G. § 4B1.2(a)(2) (1996). Because treating the additional crimes listed in the commentary as freestanding enumerated offenses would be "inconsistent" with the Guideline itself, the only way to construe them is as an interpretive tool for the now-invalidated residual clause. Indeed, several courts of appeals have already reached this exact conclusion. *See United States v. Soto-Rivera*, 811 F.3d 53, 60 (1st Cir. 2016); *United States v. Rollins*, 836 F.3d 737, 743 (7th Cir. 2016) (en banc); *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc).[3]

Second, the government suggests that because this was not Mr. Simpson's first collateral attack, the limitation on second or successive challenges at 28 U.S.C. § 2255(h) "may provide an independent basis" for denying his petition. Gov. BIO at 13. But the government's failure to identify any such "independent basis" renders this concern purely speculative. Furthermore, the Ninth Circuit's decision in *United States v. Blackstone*, 903 F.3d 1020, 1026–28 (9th Cir. 2018) (which the government relies on elsewhere, Gov. BIO at 12), involved a second or successive challenge, yet the court of appeals found no independent basis to deny the petition in that case.. Thus, Mr. Simpson's petition presents an ideal vehicle for review.

[3] Nor could Mr. Simpson's robbery predicate have satisfied the remaining definition of a "crime of violence" under § 4B1.2(a)(1), as the Ninth Circuit has held that California robbery lacks an element of the use, attempted use, or threatened use of physical force against another. *See United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015).

CONCLUSION

For these reasons, the Court should grant Mr. Simpson's petition for a writ of certiorari.

Respectfully submitted,

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