No. _____

IN THE

SUPREME COURT OF UNITED STATES

CHRISTOPHER PARKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Federal armed bank robbery, 18 U.S.C. § 2113(a), (d), is a general intent offense. *Carter v. United States*, 530 U.S. 255, 268 (2000). Decades of circuit precedent hold that intimidation under the statute is judged by the reasonable reaction of the victim, rather than by the defendant's intent. This Court has ruled that the language found in 18 U.S.C. § 924(c)(B)'s definition of a "crime of violence" is unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019); *see Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding the Armed Career Criminal Act's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), unconstitutional); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018) (holding Immigration and Nationality Act's "crime of violence" definition, 18 U.S.C. § 16(b), void for vagueness).

Following *Johnson*, Petitioner challenged his § 924(c) convictions on constitutional vagueness grounds asserting that the predicate offense, federal bank robbery, was not categorically a crime of violence. The district court denied relief, but granted Petitioner a certificate of appealability. After Petitioner filed his opening brief, the Circuit granted the government's opposed motion for summary affirmance.

The question presented is:

> Is federal armed bank robbery under 18 U.S.C. § 2113(a), (d) categorically 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?

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No. _____

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To the Honorable Chief Justice and the
Associate Justices of the Supreme Court:

CHRISTOPHER PARKER, by and through appointed counsel, respectfully petitions for a writ of certioraris to review the final order of the United States Court of Appeals for the Ninth Circuit, summarily affirming the denial of habeas relief.

OPINIONS BELOW

The order granting the government's motion for summary affirmance in Mr. Parker's appeal was unpublished. A copy is attached to this petition in the Appendix. (App-1.)

The district court's judgment and order denying habeas relief was also unreported. Copies of these, together with the magistrate judge's findings and recommendations that the district court adopted, are included in the appendix. (App-2 to App-8.)

JURISDICTION

The Ninth Circuit order affirming the denial of habeas relief was filed on December 12, 2019. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

PROVISIONS OF LAW INVOLVED

The provision of constitutional law whose application is disputed in this case is the Fifth Amendment to the United States Constitution. It reads, in pertinent part:

> [N]or shall any person . . .be deprived of life, liberty, or property, without due process of law.

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as: "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 1996 federal bank robbery statute at issue here reads, in pertinent part:

> (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 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.

18 U.S.C. § 2113(a), (d) (1996).

STATEMENT OF THE CASE

Mr. Parker is a federal prisoner held by the Bureau of Prisons serving a term of 867 months in prison. After a jury trial, Mr. Parker was convicted of conspiracy (count 1), armed bank robbery (counts 2, 4, 6, & 8) and using a firearm in furtherance of a crime of violence (counts 3, 5, 7, & 9) in violation of 18 U.S.C. §§ 371, 2113(a), (d), and 924(c). *United States v. Parker,* 2:97-cr-0202-1, Docket entry nos. 250, 254 (ED CA October 25, 1999). The indictment alleged the armed bank robberies alleged in the odd counts were the crimes of violence for 924(c) purposes. On January

28, 2000, the district court sentenced Parker to a 888-month term made up of: 60 months on Count One; 108 months for Counts Two, Four, Six, and Eight, to be served concurrently with each other and Count One; a consecutive term of 60 months on Count Three; and consecutive terms of 240 months for Counts Five, Seven, and Nine. *United States v. Parker,* 241 F.3d 1114, 1117 (9th Cir. 2001). After finding errors in the guideline calculations, the Circuit Court affirmed the convictions but vacated his sentence.[1/] *Id*. at 1120. At resentencing, the district court imposed a total sentence of 867 months: 60 months on the conspiracy count 1, 87 months each bank robbery count, concurrent to each other and to count 1, 60 months on the first 924(c) count to run consecutive, and 240 months on each of the other three 924(c) counts. The four § 924(c) convictions were each premised on the related armed bank robberies being "crimes of violence" within the meaning of 18 U.S.C. § 924(c)(3).

In 2015, this Court held that Armed Career Criminal Act's (ACCA) residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), was vague and unconstitutional. *Johnson v. United States,* 135 S. Ct. 2551 (2015) ("*Johnson II*"). Within one-year of this decision, Mr. Parker filed timely a 28 U.S.C. § 2255 motion attacking his § 924(c) convictions and sentence. He argued that *Johnson* applied to and voided the residual

[1] The appellate court rejected the trial court's use of a two-level enhancement for physical restraint under U.S.S.G. § 1B1.3(b) with respect to Count Four, and (2) a two-level enhancement for use of a minor under U.S.S.G. § 3B1.4. It remanded for resentencing.

clause in § 924(c)(3)(B), and that the bank robbery charged as the predicate offense for 924(c) purposes was not categorically a crime of violence under the remaining elements clause of § 924(c)(3)(A). On the latter point, Parker argued that federal bank robbery is not a crime of violence under the elements clause because "intimidation" for purposes of Section 2113 did not require the use, attempted use, or threatened use of *violent* physical force; nor did it require the *intentional* use of such force.

On October 3, 2018, district court, by adopting the magistrate judge's findings and recommendations, denied relief. (App-3 to App-8.) The district court granted a certificate of appealability. (App-4.)

On December 12, 2019, the Circuit summarily affirmed the district court's judgment. (App-1.)

REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI

The issue presented asks whether a defendant's conviction for federal bank robbery, 18 U.S.C. § 2113(a), (d), necessarily establishes that he is someone who was more than negligent regarding his conduct, so that others would construe his actions as a threat of violent physical force against another. Is it appropriate to subject such a defendant to the severe sentencing enhancements that section 924(c) convictions impose?

Numerous Circuits have reached logically inconsistent positions regarding federal bank robbery. These courts hold that this offense —whose conduct does not

require any specific intent or any actual or threatened violent force—qualifies as a crime of violence under the elements clauses of section 924(c)(3)(A). *See, e.g., United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018) (holding federal bank robbery is a crime of violence under § 924(c)(3)(A)); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016) (same); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017) (holding that federal bank robbery is a crime of violence under U.S.S.G. § 4B1.2(a)(1)); *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (en banc) (holding that federal carjacking by intimidation is a crime of violence under § 924(c)(3)(A)). At the same time, these Circuits also apply an ever-decreasing bar for what constitutes "intimidation" in the context of sufficiency of the evidence challenges. *See e.g., United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (rejecting insufficiency challenge where 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); *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (affirming bank robbery by intimidation conviction where the defendant affirmatively voiced no intent to use violent physical force).

The courts cannot have it both ways – either bank robbery requires a threat of violent force, or it does not; but the same rule must apply to both sufficiency cases

and to the categorical analysis applicable to § 924(c) convictions and consecutive sentences imposed based on the bank robbery. Given the heavy consequences that attach to a bank robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of law into order. Certiorari is necessary to ensure all circuits appropriately review and consider whether bank robbery categorically is a crime of violence under 924(c)(3)(A) in light of the sufficiency cases that bring into this offense's orbit conduct that is neither intentionally intimidating nor involve actual threats of violence.

A. THE CATEGORICAL APPROACH DETERMINES WHETHER AN OFFENSE IS A CRIME OF VIOLENCE

To determine if an offense qualifies as a "crime of violence," courts apply the categorical approach to discern the "minimum conduct criminalized" by the statute. *Moncrieffe v. Holder,* 133 S. Ct. 1678, 1684-85 (2013); *Almanza-Arenas v. Lynch,* 815 F.3d 469, 482 (9th Cir. 2016) (en banc). Courts must "disregar[d] the means by which the defendant committed his crime, and loo[k] only to that offense's elements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this rubric, 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,* 139 S. Ct. 544, 552-53 (2019) (citing *Johnson v. United States,* 559 U.S. 133, 140 (2010) ("*Johnson I)).* In *Johnson I,* 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 interpreted *Johnson I*'s "violent physical force" definition to encompass physical force "potentially" causing physical pain or injury to another. 139 U.S. at 554. 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).

Following *Johnson II*'s holding in the ACCA context, this Court held that the residual clause in the Immigration and Nationality Act's "crime of violence" definition, 18 U.S.C. § 16(b), is void for vagueness and violates due process. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018). The residual clause in § 16(b) is identical to the residual clause in § 924(c)(3)(B). Following the *Dimaya* decision, the government shifted gears and began to argue that the residual clause in § 924(c)(3)(B) could be saved from vagueness by jettisoning the categorical approach in favor of a conduct-specific approach. *See, e.g.*, Petition for a Writ of Certiorari, *United States v. Davis*, No. 18-431 (S. Ct.) (filed Oct. 3, 2018). The government lost this argument

in *Davis*. This Court held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. *Davis*, __ U.S. __, 139 S. Ct. 2319, 2330, 2336 (2019).

B. INTIMIDATION WITHIN THE MEANING OF 18 U.S.C. § 2113(A) IS NOT A MATCH FOR THE DEFINITION OF A CRIME OF VIOLENCE IN 18 U.S.C. § 924(c)(3)(A)

1. Federal bank robbery does not require the use or threat of *violent* physical force

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 an emotional or intellectual force on a bank teller, it does not require a threat of violent force "capable" of "potentially" "causing physical pain or injury" to another, *Stokeling,* 139 S. Ct. at 554. The Ninth Circuit's *United States v. Lucas*, 963 F.2d 243 (9th Cir. 1992), provides an example. Lucas 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 at 244. The Circuit held that Lucas's conduct, by "opening the bag and requesting the money," employed "intimidation," and rejected an insufficiency challenge. *Id.* at 248. Because there was no threat – explicit or implicit – to do anything, let alone use violence, if that demand was not met, the minimum conduct necessary to sustain a conviction for bank robbery does not satisfy *Stokeling*'s standard for a crime of violence under the elements

clause. *See also United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (rejecting insufficiency challenge where defendant gave bank teller a note demanding money in denominations the teller did not have and "left the bank in a nonchalant manner" after the teller walked toward the vault. *Id*. ("'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapons' are not required for a conviction for bank robbery by intimidation").

Though such a minimal level of conduct is sufficient in the Ninth Circuit to sustain a bank robbery conviction, the Circuit nonetheless concluded in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), that bank robbery *always* requires the threatened use of *violent* physical force. This decision cannot be squared with the Circuit's sufficiency decisions and means that either the Ninth Circuit is ignoring this Court's decisions setting out the standard for violence -- or, for decades, people have been found guilty of bank robbery who simply are not guilty. Either way, the matter requires this Court's intervention.

The Court's attention is needed because this pattern of inconsistent holdings applies broadly across the Circuits. 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). And yet, the same Court has consistently concluded since *Johnson I* and *Johnson II* that bank robbery requires the violent use of force. *E.g., United States v. Higley,* 726 F. App'x 715, 717 (10th Cir. 2018).

The Fourth Circuit, in *United States v. Ketchum,* similarly upheld a bank robbery by intimidation conviction against a sufficiency challenge where the defendant affirmatively voiced no intent to use violent physical force. 550 F.3d 363, 365 (4th Cir. 2008). To the contrary, Ketchum gave a teller a note that read, "These people are making me do this," and then 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 Ketchum money and he left the bank. *Id.* And yet, the Fourth Circuit has *also* held that "intimidation" necessarily meets the threatened use of violent physical force required for crime of violence purposes. *McNeal,* 818 F.3d at 157.

Likewise, the Fifth and Eleventh Circuits uphold convictions for robbery by intimidation where there was no weapon, no verbal or written threat, and where the victims were not actually afraid, if the hypothetical ordinary and reasonable person would be in fear. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987); *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005) (when teller stepped away from her station to use the phone, defendants reached across counter,

opened her unlocked cash drawer, grabbed cash, and ran away without saying anything; found sufficient for robbery by intimidation conviction). Yet, these Circuits also hold that for "crime of violence" purposes the "intimidation" element is met because such an offense necessarily requires the threatened use of violent physical force. *Brewer,* 848 F.3d at 716; *Ovalles,* 905 F.3d 1300.

Each of these courts have applied a non-violent construction of "intimidation" in rejecting insufficiency of the evidence challenges to bank robbery convictions, but have held that "intimidation" *always* requires a defendant to threaten the use of violent physical force. The two positions cannot be squared.

In *Watson*, the Ninth Circuit reached its conclusion that bank robbery qualifies as a crime of violence by asserting that bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson I* standard.'" 881 F.3d at 785 (citing *Johnson I,* 559 U.S. 133). It is wrong, however, to equate the imputed willingness to use force with a threat to do so. Indeed, the Ninth Circuit previously acknowledged this very distinction. In *United States v. Parnell,* 818 F.3d 974, 980 (9th Cir. 2016), the government had argued that a defendant who commits a robbery while armed harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. In finding the Massachusetts armed robbery statute at issue did not qualify as a violent felony, the Circuit rejected the government's position and held that "[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 follow, or even address, this distinction.

This Court should grant certiorari to review this question: whether federal armed bank robbery by intimidation is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) because the offense fails to require any *intentional* use, attempted use, or threatened use of *violent* physical force.

2. Federal Bank Robbery is a General Intent Crime; the Government has Not been Required to Prove Beyond a Reasonable Doubt that Defendants Understood that Their Conduct was Perceived as Intimidating by Another

As discussed above, both the Circuit below and this Court recognizes that section 2113(a) is a general intent crime. This means the government need not prove beyond a reasonable doubt that the defendant purposely threatened to harm anyone. *United States v. Burnim*, 576 F.2d 236, 237 (9th Cir. 1987); *Carter v. United States*, 530 U.S. 255, 269-70 (2000). Because section 2113(a) defines a general intent crime, the requisite *mens rea* is established by proof that the defendant took the property of another through conduct that can be characterized as intimidating. Thus, "[w]hether [the defendant] specifically intended to intimidate [the victim] is irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). The element of intimidation is established so long as the defendant willfully engages in conduct

"that would put an ordinary, reasonable person in fear of bodily harm," regardless of whether the defendant understood that his conduct would be perceived as intimidating by the ordinary person, let alone intended to intimidate anyone. *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990).

It follows that the Circuit has held that a defendant can be convicted of bank robbery by intimidation where he does no more than calmly hand a note to a teller explaining that a bank robbery is in progress and politely requesting that the teller provide him with some money. Even if the defendant is unaware of the inherently intimidating nature of his conduct, there is sufficient evidence to convict. *See e.g., Lucas*, 963 F.2d at 247-48; *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991); *Hopkins*, 703 F.2d at 1103.

Indeed, even where the defendant does not interact with the teller at all, but simply reaches over and/or jumps over the counter and removes the money himself, circuit courts have had no problem concluding that the element of "intimidation" had been established because the defendant's conduct could be perceived as intimidating to the tellers present regardless of the defendant's intent. *See, e.g., Kelley*, 412 F.3d at 1245-46 (explaining that "intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts," and thus "[w]hether 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") (internal quotations omitted); *United States v. Caldwell*, 292 F.3d 595, 597 (8th Cir. 2002) (holding that where the defendant did not say anything to the teller, nor make any intimidating gestures nor indicate in any way that he was armed, the element of intimidation was still satisfied because the act of slamming his hands on the counter as he leapt over it to walk by the teller and take the money from an unlocked drawer would make "any reasonable bank teller [feel] intimidated"). In other words, the government's burden of proof to establish bank robbery by intimidation is "low;" all the government need establish is that 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." *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016).

Not surprisingly, therefore, district courts instruct juries that all the government needs to prove in order to establish "intimidation" is that the defendant willfully took the money "in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Hamman*, No. 3:16-cr-185, Doc 96 at 9 (D. Oregon, Instructions Filed 1/24/17); *see, e.g., United States v. Johnson*, No. 8:13-cr-190, Doc. 273 at 20 (C.D. Cal., Instructions Filed 1/20/17) (to establish "intimidation," the government needs to prove only that the defendant "knowingly and deliberately did something . . . that would cause a reasonable person under those circumstances to be fearful of bodily injury"). There is no ambiguity under this Court's

firmly established precedent; to secure a conviction under § 2113(a) the government does not need to establish that the defendant understood that his conduct would be perceived as intimidating by another.

A second independent reason for granting certiorari rests with the Circuit's failure to recognize the implications for "crime of violence" analysis that bank robbery is a general intent crime. To commit a crime of violence, 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, a defendant can commit a bank robbery by intimidation without intentionally intimidating anyone.

The Circuit refused to allow full briefing and consideration of the issues, but summarily affirmed based on *Watson*. But *Watson* plainly conflicts with this Court's *Carter* decision. *Carter* holds the federal bank robbery statute, § 2113(a), "contains no explicit *mens rea* requirement of any kind." 530 U.S. at 267. *Carter* further explained that federal bank robbery does not require an "intent to steal or purloin." *Id.* 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.'" *Id.* at 269.

Thus, *Carter* recognized that 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)," *id.,* but found no basis

to impose a specific intent in § 2113(a), *id.* 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 the elements clause of § 924(c)(3)(A) to categorically qualify as a "crime of violence."

Consistent with *Carter,* the Ninth Circuit holds that 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. *Foppe,* 993 F.2d at 1451 (affirming conviction, holding jury need not find defendant intentionally used force and violence or intimidation on the victim bank teller.) A specific intent instruction was unnecessary, *Foppe* concluded, 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 agree that bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent. *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) ("[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . 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.") (internal quotations omitted); *Kelley,* 412 F.3d at 1244 ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating."); *United States v. Yockel,* 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

This Court recognizes that if an act turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks," then only a negligence standard is required. Such offenses do not require an intentional *mens rea*. *Elonis v. United States,* 135 S. Ct. 2001, 2011 (2015). Because jurors in a bank robbery case are called on only to judge what a reasonable bank

teller would feel – as opposed to the defendant's intent – the statute cannot be deemed a categorical crime of violence.

The Ninth Circuit and its sister Circuits' *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 address whether bank robbery is categorically a "crime of violence" under the elements clause, because general intent "intimidation" does not satisfy this standard.

As this Court clarified in *Leocal*, the use of force is not dispositive. The definition of a crime of violence under § 16(a), like the definition under § 924(c)(3)(A) at issue here, contains a critical attendant circumstance – *against the person or property of another*. Accordingly, we look not to the fact that a defendant intentionally used force (or intentionally engaged in conduct that a reasonable person would perceive as threatening). Instead, we ask whether, when the defendant engaged in said conduct, did he act with more than negligence with respect to the possibility that said conduct would result in harm to another or be perceived by a reasonable person as threatening harm. In other words, the dispositive element under § 16(a) and § 924(c)(3)(A) is "against the person or property of another," and specifically the defendant's intent with respect to the "'use . . . of physical force *against the person or property of another*.'" *Leocal*, 543 U.S. at 9 (emphasis in original).

Notably, both parties in *Leocal* looked just to the fact that the defendant used (or threatened to use) force, and not to the defendant's awareness that said use of force might be directed at the person of another, or perceived to be threatening by the person of another. *Id*. at 9. The *Leocal* Court explained that this analysis was incorrect. Where the statute includes the language "against the person or property of another," the parties were wrong to look to the defendant's intentional use of force. Instead, what mattered was the *defendant's awareness* that said intentional use of force might impact the person of another. *Id.*

Indeed, as this Court has subsequently explained, when the relevant statutory language simply requires proof of the use of force, that can be satisfied by the "knowing or intentional application of force," *United States v. Castleman*, 134 S. Ct. 1405, 1409, 1415 (2014), but the analysis is different when the narrowing language "against the person or property of another" is added. *Leocal*, 543 U.S. at 9. Accordingly, the "critical aspect" of the crime of violence defined under § 16(a) and § 924(c)(3)(A), in contrast to the definition at issue in *Castleman*, is that the predicate offense necessarily requires not only the intentional use of force but "one involving the 'use . . . of physical force *against the person or property of another*.'" *Leocal*, 543 U.S. at 9 (ellipse and emphasis in original). And, where the "key phrase in § 16(a) [is] – the 'use. . . of physical force against the person or property of another,'" a conviction for the predicate offense must necessarily establish that the

defendant acted with "a higher degree of intent than negligent or merely accidental conduct" with respect to the possibility that his conduct would harm another. *Leocal*, 543 U.S. at 9.

In other words, sections 16(a) and 924(c)(3)(A) target a narrower class of defendants: those who have a certain callousness towards others – those who, at the very least, perceive the risk of harm to others, but act anyway. *See, e.g., Begay v. United States*, 553 U.S. 137, 145 (2008) (explaining that while a person may intentionally drink, and presumably, intentionally drive, DUI statutes do not require proof that a defendant "purpose[fully] or deliberate[ly] drove under the influence, and "this distinction matters considerably" where, under a recidivist sentencing statute, or in the case of the enhancement under § 924(c), the question is whether a defendant's convictions stand for the proposition that he possesses such a high degree of danger to others that a sentencing judge must be stripped of his/her discretion under 18 U.S.C. § 3553(a)).

If a court limited its analysis to simply whether a defendant intentionally engaged in dangerous conduct, without asking whether the defendant necessarily knew the harm he was exposing others to, then the "mandatory minimum sentence would apply to a host of crimes which, though dangerous" do not necessarily evince "the deliberate kind of behavior associated with violent criminal use of firearms." *Begay*, 553 U.S. at 146-47 (citing, among other offenses, 18 U.S.C. § 365(a) which

proscribes the tampering of consumer products under circumstances manifesting extreme indifference to the risk that by so doing one is placing another person in danger of death or bodily injury, as an offense that does not identify the type of person Congress meant to capture when defining a violent felony); *c.f., United States v. Smith*, 544 F.3d 781, 785 (7th Cir. 2008) ("We must remember that the enhanced prison term under the ACCA [and § 924(c)] is imposed *in addition* to prison time that already has been served for the predicate felony convictions," and is reserved for "those offenders whose criminal history evidenced a high risk for recidivism and future violence") (emphasis in original).

Not surprisingly, the Ninth Circuit sitting *en banc* reiterated the critical distinction that the *Leocal* Court drew between those offenses that simply require proof that the defendant intentionally used force and those that require proof beyond a reasonable doubt that the defendant intentionally used force *against the person of* another, by clarifying that the phrase "against the person of another" "implies the use of force must be a means to an end." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1131-32 (9th Cir. 2006). In other words, the issue is not whether the defendant intentionally used force, or intentionally engaged in conduct that might be perceived by others as a threat, but whether the offense of conviction requires proof beyond a reasonable doubt of the *intentional* "*use* . . . of physical force *against* the person or property of another." *Id*. at 1131 (emphasis in original). Following *Fernandez-Ruiz*,

the Circuit has therefore "place[d] crimes *motivated by intent* on a pedestal, while pushing off other very dangerous and violent conduct, because not intentional, does not qualify as a 'crime of violence.'" *Teposte v. Holder*, 632 F.3d 1049, 1053 (9th Cir. 2011) (emphasis added).

Thus, a second independent need for review is focused on the definition of a crime of violence under section 924(c)(3)(A) and its limiting language "against the person of another." This Court should grant certiorari to address whether the government must prove beyond a reasonable doubt that a defendant must be more than negligent with respect to whether his intentional conduct could harm another.

CONCLUSION

Mr. Parker respectfully requests that this Court grant his petition, vacate the Ninth Circuit's decision, and remand to the district court for a grant of habeas relief and resentencing.

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Respectfully submitted,

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