No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Austin Peterson,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

1. Federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) can be committed "by force and violence, or by intimidation . . . or . . . by extortion" and, therefore, does not require the specific intent to use, attempt to use, or threaten to use violent physical force. Numerous federal circuits interpret bank robbery to include such minimal, nonviolent conduct as a request for money. Does this offense nevertheless qualify as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A)?

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Petition for Writ of Certiorari

Petitioner Austin Peterson respectfully petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Ninth Circuit. Peterson asks this Court to grant certiorari, vacate the Ninth Circuit's denial of a certificate of appealability, and remand for further proceedings.

Related Proceedings and Orders Below

The order denying Peterson's motion to vacate under 28 U.S.C. § 2255 in the United States District Court for the District of Nevada, *United States v. Peterson*, 2:10-CR-234-GMN-RJJ, Dkt. No. 52 (D. Nev. Sept. 28, 2019), and the order denying appellate relief in the Ninth Circuit Court of Appeals, *United States v. Peterson*, No. 19-17402, Dkt. No. 5 (9th Cir. May 15, 2020), are attached in the Appendix.

Jurisdiction

The Ninth Circuit Court of Appeals entered its final order in Peterson's case on May 15, 2020. *See* Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Supreme Court Rule 13.3.

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Relevant Constitutional and Statutory Provisions

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

[A]n 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.

Title 18 of the United States Code, Section 2113, defines armed bank robbery as:

(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.

Statement of the Case

Petitioner Austin Peterson is currently serving a 177-month sentence, seven years of which is unconstitutional. His 2011 conviction for brandishing a firearm during a crime of violence resulted in a mandatory seven-year prison sentence imposed without the benefit of this Court's decisions in *Johnson v. United States*, 135 S. Ct. 2251 (2015), and *United States v. Davis*, 139 S. Ct. 2319 (2019). These decisions dramatically limited what predicate offenses qualify as crimes of violence under 18 U.S.C. § 924(c). As a result, Peterson is serving a federal prison sentence despite no longer meeting the elements of the charge underlying his conviction.

I. Peterson's Indictment, Guilty Plea, and Sentencing

In 2010, Peterson pleaded guilty pursuant to a plea agreement to two counts of federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) (Counts One and Eight), five counts of interference with commerce by robbery (Hobbs Act robbery) under 18 U.S.C. § 1951 (Counts Three to Seven), one count of brandishing a firearm during and in relation to a crime of violence under 18 U.S.C. §§ 924(c)(1)(A) and (c)(1)(C) (Count Nine), and two counts of possession of a stolen firearm under 18 U.S.C. §§ 922(j) and 924(a)(2) (Counts Ten and Eleven). Dist. Ct. Dkt. Nos. 15, 23, 31. The § 924(c) charge, Count Nine, alleged Peterson, "during an in relation to and in furtherance of the crime of violence charged in in Count Eight . . . knowing and intentionally used and carried a firearm, . . . said firearm being brandished." Dist. Ct. Dkt. No. 15, p.6.

The district court sentenced Peterson to concurrent terms of 93 months' imprisonment on Counts One, Three to Eight, and Ten, and a mandatory consecutive term of 84 months' imprisonment on the § 924(c) charge, Count Nine, for a total of 177 months. Dist. Ct. Dkt. No. 31. Peterson did not appeal. He remains incarcerated in Lompoc, California, with a projected release date of December 21, 2023.

II. This Court subsequently strikes down "residual clauses" in various federal statutes as unconstitutionally vague, including 18 U.S.C. § 924(c).

More than four years following Peterson's conviction and sentencing, this Court invalidated the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court subsequently held *Johnson* announced a new substantive rule retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016). Then, in *United States v. Davis*, this Court held the residual clause of 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague under the Due Process Clause. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

III. Peterson files a motion to vacate under 28 U.S.C. § 2255, but despite this Court's decisions in *Johnson* and *Davis*, the district court and Ninth Circuit Court of Appeals deny relief.

Based on *Johnson*, Peterson timely filed a motion to vacate his § 924(c) conviction and sentence under 28 U.S.C. § 2255. Dist. Ct. Dkt. Nos. 38, 39. Peterson argued federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) no longer qualifies as a crime of violence. Dist. Ct. Dkt. Nos. 38, 39. The district court

denied relief, holding armed bank robbery implicates the remaining elements clause of § 924(c)(3)(A) under the Ninth Circuit's decision in *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). Appendix B. The court further denied Peterson a certificate of appealability. Appendix B.

Peterson timely requested a certificate of appealability from the Ninth Circuit. *United States v. Peterson*, No. 19-17402, Dkt. 4 (9th Cir. Dec. 31, 2019). The Ninth Circuit denied relief, summarily holding Peterson "ha[d] not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Watson*, 881 F.3d 782 (9th Cir.), cert. denied, 139 S. Ct. 203 (2018)." Appendix A.

Reasons for Granting the Petition

This Court has long attempted to unify the "crime of violence" definitions in federal criminal statutes. Most recently, this Court clarified one of these statutes—18 U.S.C. § 924(c)—that had previously caused rampant discord among federal circuit and district courts. Nevertheless, the Ninth Circuit Court of Appeals' decision in this case, along with decisions of other circuit courts, continue to erroneously hold that federal armed bank robbery—an offense criminalizing conduct that does not require any specific intent or any violent force—qualifies as a crime of violence under § 924(c)'s remaining elements clause.

This case therefore presents a question of exceptional importance for those convicted under 18 U.S.C. § 924(c), including Peterson, 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 without intentional violent force as crimes of violence under § 924(c).

I. This Court retroactively invalidated the residual clause at 18 U.S.C. § 924(c)(3)(B).

Section 924(c) provides for a series of graduated, mandatory, consecutive sentences for using or carrying a firearm during and in relation to a "crime of violence." 18 U.S.C. § 924(c)(3). The statute 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.

18 U.S.C. § 924(c)(3). The first clause, § 924(c)(3)(A), is referred to as the elements clause. The second clause, § 924(c)(3)(B), is referred to as the residual clause. This Court invalidated § 924(c)(3)(B) in *Davis*, holding the residual clause unconstitutionally vague in violation of due process. 139 S. Ct. at 2336.

A decision of this Court applies retroactively to cases on collateral review if it announces a "substantive" rule, meaning it "alters" the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264-65 (citing *Teague v. Lane*, 489 U.S. 288 (1989)). This includes "constitutional determinations that place

particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* (citation omitted). In *Welch*, this Court found *Johnson*, 135 S. Ct. 2551, retroactive because it altered the punishment for a class of people once subject to the ACCA who could no longer be classified as such based on the statute's now-defunct residual clause. *Id.*

As in *Johnson*, *Davis* not only alters sentences but renders innocent a class of people once subject to § 924(c) liability based on predicate offenses that solely fell within § 924(c)'s now-defunct residual clause. *Davis* thereby alters the range of conduct and class of persons that can be punished under § 924(c). Indeed, the Solicitor General in *Davis* conceded that *Davis* is retroactive on collateral review because it is substantive. *See* Brief for the United States, *United States v. Davis*, Sup. Ct. No. 18-431 (Feb. 12, 2019), at 52. *Davis* is, therefore, retroactive.

II. Classifying federal armed bank robbery as a crime of violence conflicts with this Court's precedent.

Peterson's 18 U.S.C. § 924(c) conviction and sentence rest on the district court's findings that federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) is a crime of violence. However, the residual clause in § 924(c) no longer provides a basis to hold federal armed bank robbery a crime of violence, and thus the § 924(c) elements clause remains the only available avenue. 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" as required by the

elements clause. 18 U.S.C. § 924(c)(3)(A). The federal armed bank robbery statute therefore does not meet the elements clause of § 924(c).

A. The categorical approach applies to determine wither 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, 191 (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). *Davis* reaffirmed the continuing applicability of the categorical approach to a crime-of-violence analysis. 139 S. Ct. at 2326-36. 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 2248.

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 requirements for "violent force" under the elements clause. First, violent *physical* force is required for a statute to meet § 924(c)'s elements clause. *Stokeling v. United States*, 139 S. Ct. 544, 554 (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 (emphasis in original). In *Stokeling*, this Court recently interpreted *Johnson 2010*'s "violent physical force" definition to encompass physical force with the "potentiality" of causing physical pain or injury to another. 139 S. Ct. at 544. 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 can be committed "by force and violence, or by intimidation . . . or . . . by extortion." 18 U.S.C. § 2113(a). Applying the categorical approach, bank robbery by intimidation and bank robbery by extortion fall at the least egregious end of § 2113(a)'s range of covered conduct. *United States v. Castillo-Marin*, 684 F.3d 914, 923 (9th Cir. 2012) ("[E]ven the least egregious conduct the statute covers must qualify.") (alteration in original) (citation omitted)). Because bank robbery by intimidation or by extortion does not require the intentional use, attempted use, or threatened use of violent physical force, federal armed bank robbery fails to constitute a "crime of violence" under the remaining § 924(c)(3)(A) elements clause.

B. Federal bank robbery by intimidation does not categorically require an element of intentional violent physical force.

The "intimidation" decisions among the Fourth, Fifth, Ninth, and Eleventh Circuits 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. Review of the problematic bank robbery decision currently controlling the Ninth Circuit on which it relied to deny Peterson relief in this case, *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (U.S. Oct. 1, 2018), illustrates why. *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.

Watson 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*, 139 S. Ct. at 554; and (2) violent force must be physical force, rather than "intellectual force or emotional force." *Id.* at 552 (quoting *Johnson 2010*, 559 U.S. at 138).

In *Stokeling*, this Court, looking to common-law robbery, clarified violent physical force is more than "nominal conduct" and includes "the force necessary to overcome a victim's physical resistance." 139 S. Ct. at 553. "[R]obbery that must overpower a victim's will," this Court explained, "*necessarily* involves a physical confrontation and struggle." *Id.* (emphasis added). Violent physical force must at least be "*capable* of causing physical pain or injury." *Id.* at 554 (emphasis in original) (quoting *Johnson 2010*, 559 U.S. at 140).

Yet, federal bank robbery can be accomplished by "mere 'intimidation.'" *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991). "[E]xpress threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s] are *not* required for a conviction for bank robbery by intimidation." *Id.* (alteration and emphasis in original) (citation omitted). Accordingly, 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 impact on a bank teller, it does not require threatening, attempting, or inflicting violent physical force capable of causing pain and injury to another or another's property. Federal bank robbery, which can readily be accomplished by intimidation, lacks the requisite element of use or threat of violent physical force.

In finding federal bank robbery by intimidation a crime of violence, *Watson* assumed an act of intimidation necessarily involved a separate willingness to use violent physical force, and further assumed that willingness was the equivalent of threatening to use violent physical force. These assumptions are fallacious for at least three reasons.

First, intimidation does not require a willingness to use violent physical force. This Court recognizes 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 Court's definition.

Second, even if intimidation did require a willingness to use violent force, the Ninth Circuit acknowledges elsewhere "[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). In *Parnell*, the government argued 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 the Ninth Circuit's own recognized distinction.

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 a defendant actually "communicated [an] intent to inflict harm or loss on another." *Elonis*, 135 S. Ct. at 2008 (defining "threat"). Indeed, an examination of bank robbery cases reveals numerous affirmances when reviewing for sufficiency of the evidence, despite the lack of intimidation by threatened violent physical force.

For example, in *United States v. Lucas*, the Ninth Circuit found intimidation where 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, 248 (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 Ninth Circuit affirmed a conviction on the basis of intimidation even where the defendant "spoke calmly, made no threats, and was clearly unarmed," because he 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). The Ninth Circuit held "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). Yet the Tenth Circuit conversely holds, under a crime of violence

analysis, intimidation requires "a threatened use of physical force." *United States v. McCranie*, 889 F.3d 677, 681 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1260 (2019).

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 use of violent physical force. *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016)), *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 (11th Cir. 2018).

The Fourth, Fifth, Tenth, 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 categorically qualifies as 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. Intimidation is a general intent crime.

Section 924(c)'s elements clause requires the use of violent force to 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, a defendant's conduct need not 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). Thus, federal bank robbery does not require an "intent to steal or purloin." *Id.* In evaluating the applicable mens rea, *Carter* 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.

Carter 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, this 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)'s as a general intent crime means the statute requires nothing more than mere 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 court suggest the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see also Hopkins*, 703 F.2d at 1103 (approving instruction stating intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear).

Other circuits' decisions are in accord: bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent. The Fourth Circuit holds "[t]he intimidation element of § 2113(a) is satisfied if an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from

the defendant's acts, whether or not the defendant actually intended the intimidation." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (citation omitted). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Id.* The Eleventh Circuit similarly held in *Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d at 1244. Likewise, the Eighth Circuit holds that a jury may not consider the defendant's mental state as to the intimidating character of the offense conduct. *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

As a general intent crime, an act of intimidation can be committed negligently, a mens rea insufficient to demonstrate an intentional use of violent force. This Court explained in *Elonis* that 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[.]" 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 may find "intimidation" based on the victim's reaction rather than the defendant's intent. Neither an express threat nor threatening movement is required to commit 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. Federal armed bank robbery, a general intent crime that can be committed by mere negligence, has no such requirement. Without an intentional mens rea requirement, a conviction under the federal bank robbery statute does not categorically qualify as a crime of violence.

Watson's sub silentio holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Certiorari is necessary to correctly instruct circuit courts that general intent "intimidation," as used in the federal bank robbery statute, does not require an intentional threat of violent physical force, and therefore, is not a crime of violence under the elements clause of 18 U.S.C. § 924(c).

C. Federal bank robbery by extortion does not categorically require an element of intentional violent force.

Section § 2113(a) does not define "extortion." As this Court has explained: "[w]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Evans v. United States*, 504 U.S. 255, 259 (1992) (citation omitted). Absent "contrary direction," "a statutory term is generally presumed to have its common-law meaning." *Id.* (citations omitted); *United States v. Santos*, 553 U.S. 507, 511 (2008) ("When a term is undefined, we give it its ordinary meaning.").

"At common law, extortion was an offense committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties." *Evans*, 504 U.S. at 260 (footnote omitted) ("Extortion by the public official was the rough equivalent of what we would now describe as "taking a bribe."). But as this Court explained in *Evans*, "Congress has unquestionably *expanded* the common-law definition of extortion to include acts by private individuals pursuant to which property is obtained by means of force, fear, or threats." *Id.* (emphasis in original); *United States v. Lazarenko*, 564 F.3d 1026, 1039 (9th Cir. 2009). This Court thus broadly defines generic extortion "as obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (citation and internal quotation marks omitted).

Bribery, however, does not require violent physical force. *See, e.g., Evans*, 504 U.S. at 257-60 (affirming conviction for extortion under 18 U.S.C. § 1951 and observing it was "clear" the defendant committed bribery where defendant, an elected official, accepted "cash knowing that it was intended to ensure that he would vote in favor of [a] rezoning application").

Nor do wrongful fear or threats necessitate violent physical force. *See United States v. Valdez*, 158 F.3d 1140, 1143 n.4 (10th Cir. 1998). Rather, "the threats that can constitute extortion . . . include threats to harm property and to cause other unlawful injuries." *United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018) (citation omitted); *see also United Bhd. of Carpenters & Joiners of Am. v. Bldg. &*

Const. Trades Dep't, AFL-CIO, 770 F.3d 834, 838 (9th Cir. 2014) (holding wrongful fear under 18 U.S.C. § 1951 "include[s] fear of economic loss"). For example, in *United States v. Nardello*, this Court held the defendants' attempt "to obtain money from their victims by threats to expose alleged homosexual conduct . . . encompasse[d] a type of activity generally known as extortionate since money was to be obtained from the victim by virtue of fear and threats of exposure." 393 U.S. 286, 295-96 (1969) (declining "to give the term 'extortion' an unnaturally narrow reading").

Extortion also encompasses such conduct as kidnapping for ransom, *see United States v. Carpenter*, 611 F.2d 113, 114 (5th Cir. 1980), yet this Court holds "[t]he 'crime of violence' provision would not pick up demanding a ransom for kidnapping." *Torres v. Lynch*, 136 S. Ct. 1619, 1629 (2016) (referencing extortion under 18 U.S.C. § 875(a) for purposes of 18 U.S.C. § 16). To the extent extortionate conduct under § 2113 encompasses threats made to intangible property, or to future harm to devalue an economic or reputational interest, federal bank robbery by extortion does not require violent physical force.

The plain language of federal armed bank robbery provides another reason why extortion does not encompass violent force. Section 2113(a) expressly sets forth other alternative means to commit bank robbery: taking "by force and violence, or by intimidation." This Court holds a "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment," *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990),

superseded on other grounds by statute, instructing that "[j]udges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf v. United States,* 510 U.S. 135, 140 (1994). Following this Court's mandate, extortion under § 2113(a) must not be read to require violent force, so as to "give effect . . . to every clause and word of [the] statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations and internal quotation marks omitted).

Extortion, therefore, does not require the use, attempted use, or threatened use of force. Certiorari is necessary to clarify federal armed bank robbery by extortion is therefore not a crime of violence under the elements clause of 18 U.S.C. § 924(c).

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

Armed bank robbery requires proof a defendant "use[d] a dangerous weapon or device." 18 U.S.C. § 2113(d). This fact does not render a bank robbery conviction a crime 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 clause's requirements of violent physical force.

Second, this Court applies a subjective standard to § 2113(d), 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. The defendant was nevertheless guilty of armed bank robbery even though he: (1) did not "want[] the bank employees to believe [he] had a real gun," and (2) believed anyone who perceived the gun accurately would know it was a toy. Such a defendant does not intend to threaten violent force. At most, his threat to use force is reckless. Recklessness, however, is insufficient to render an offense a crime of violence. *Leocal*, 543 U.S. at 12-13.

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. Certiorari is necessary to clarify the "armed" element of federal armed bank robbery does not render the offense a crime of violence under § 924(c)(3)(A).

E. The federal bank robbery statute is not divisible.

The final step of categorical approach analyzes whether 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.* As demonstrated above, the federal armed bank robbery

statute is overbroad. Because it is also indivisible, a conviction under the statute cannot constitute 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 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. 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. 439 F.3d at 612. *Watson* did not include an explanatory parenthetical when citing *Jennings*. 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.

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. 1989), which demonstrates § 2113(a) is indivisible. In *Gregory*, the Ninth Circuit held "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.

Like *Watson*, other circuits similarly misapply the divisibility analysis, holding § 2113(a) sets forth separate elements. *See King v. United States*, 965 F.3d 60, 69 (1st Cir. 2020); *United States v. Evans*, 924 F.3d 21, 28 (2d Cir.), *cert. denied*, 140 S. Ct. 505 (2019); *United States v. Butler*, 949 F.3d 230, 236 (5th Cir. 2020), cert. filed, (No. 20-5016) (U.S. July 10, 2020).

Conversely, the Third Circuit is in accord with *Gregory*. *United States v. Askari*, 140 F.3d 536, 548 (3d 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."), *vacated on other grounds*, 159 F.3d 774 (3d Cir. 1998). And 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 Crim. Jury Instr. 7th Cir. 539 (2012).

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." *Id.* 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), *cert. denied*, 137 S. Ct. 830 (2017).

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." 18 U.S.C. § 2113(a). 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* § 2113(a). 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 United States v. Holloway*, 309 F.3d 649, 651 (9th Cir. 2002). 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.

Certiorari is necessary to clarify that 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

This case presents a constitutional question of exceptional importance for defendants facing mandatory consecutive sentences under 18 U.S.C. § 924(c). For the reasons set forth herein, Peterson requests this Court grant this petition for certiorari.

Respectfully submitted,

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