No. 20-5396

**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

# REPLY BRIEF FOR PETITIONER

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## Reply Brief for the Petitioner

The federal Circuit courts have become increasingly entrenched in an erroneous position that both creates irreconcilable intra-Circuit conflict and misapplies this Court's longstanding precedent. With courts holding federal armed bank robbery, 18 U.S.C. § 2113(a) and (d), qualifies as a predicate crime of violence under 18 U.S.C. § 924(c)'s elements clause, defendants are routinely convicted and sentenced under § 924(c) absent a predicate offense requiring the use, attempted use, or threatened use of violent physical force. The time is ripe for final resolution of this issue and Petitioner Austin Peterson's petition—presenting a preserved, purely legal issue of nationwide importance—offers an excellent vehicle for this Court's review.[1]

### I. Certiorari is necessary to determine whether "intimidation" under the federal armed bank robbery statute, 18 U.S.C. § 2113(a) and (d), requires an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c).

Because the residual clause in 18 U.S.C. § 924(c)(3)(B) is invalid, it is no longer a basis to hold federal armed bank robbery is a crime of violence; therefore, § 924(c)(3)(A)'s elements clause is the only possible avenue for its application. The elements clause requires a predicate offense has "as an element the use, attempted use, or threatened use of physical force against the person or property of another."

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[1] Peterson respectfully submits this limited reply in response to new points raised by the government in the Memorandum for the United States in Opposition, *Peterson v. United States*, No. 20-5396 (Oct. 16, 2020), and otherwise continues to rely on the points and authorities set forth more fully in his Petition for Certiorari, *Peterson v. United States*, No. 20-5396 (Aug. 13, 2020).

18 U.S.C. § 924(c)(3)(A); *Johnson v. United States*, 559 U.S. 113 (2010) (*Johnson 2010*). Federal armed bank robbery under § 2113(a) and (d) lacks this element. Federal armed bank robbery also lacks another elements clause requirement, an intentional mens rea. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004).

Instead, federal armed bank robbery can be committed "by intimidation . . . or . . . by extortion." 18 U.S.C. § 2113(a). Though the government disputes whether federal armed bank robbery includes robbery by extortion, Gov. Br. in Opp. at 20-25, *Johnson v. United States*, No. 19-7079 (Apr. 24, 2020),[2] the government appears to agree that, applying the categorical approach, the least egregious conduct the statute covers is intimidation. *Id.* at 9-20 (discussing armed bank robbery by "intimidation").

For these reasons, a conviction under the federal armed bank robbery statute cannot serve as a predicate offense under § 924(c)'s elements clause.

### A. Federal armed bank robbery by intimidation does not require an intentional mens rea.

This Court's precedent requires an intentional mens rea for crimes of violence. Pet. at 17; *Leocal*, 543 U.S. at 12-13. A crime committed negligently or recklessly, therefore, does not qualify as a crime of violence. *Leocal*, 543 U.S. at 12-13. Section 2113(a), however, "contains no explicit *mens rea* requirement of any

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[2] Because the government's memorandum in opposition to Peterson's petition for certiorari relies upon the arguments made in the government's brief in opposition to the petition for a writ of certiorari in *Johnson v. United States*, No. 19-7079, Peterson cites to the relevant portions of the government's brief in *Johnson*.

kind," and federal bank robbery does not require an "intent to steal or purloin." *Carter v. United States*, 530 U.S. 255, 267 (2000). The government agrees that, under *Carter*, federal armed bank robbery is a general intent crime. Gov. Br. in Opp. at 16-18, *Johnson*, No. 19-7079.

The recognized lack of intent in the federal armed bank robbery statute is amplified by the Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits' holdings that robbery by intimidation focuses on the objective reaction of the victim, not on the *defendant's* intent. Pet. at 13-20. A victim-focused intent standard cannot satisfy this Court's requirement that the *defendant* intentionally use, attempt to use, or threaten to use violent physical force. *See Leocal*, 543 U.S. at 12-13.

The government does not dispute that a threat is negligently committed when the mental state depends on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks." Pet. at 19 (quoting *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015)); Gov. Br. in Opp. at 18, *Johnson*, No. 19-7079 (acknowledging "intimidation is defined at least partly in objective terms of what a reasonable, ordinary person would find intimidating") (citation and internal quotation marks omitted). Under *Leocal*, a crime that can be committed negligently does not qualify as a crime of violence. 543 U.S. at 12-13.

Presumably to avoid *Leocal*, the government contends federal bank robbery by intimidation requires proof the defendant "knew his actions were objectively intimidating," thus "separat[ing] this offense from crimes of mere negligence." Gov.

Br. in Opp. at 18, *Johnson*, No. 19-7079 (citations omitted). But knowledge is not intent, and the government's contention ignores that the conduct itself satisfies the general intent standard. *See, e.g., 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. . . ."); *United States v. Foppe*, 993 F.2d 1444, 1251 (9th Cir. 1993) (permitting jury to "infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation" and explaining "intimidation" is "guided by an objective test focusing on the accused's actions"); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) ("As intimidation is measured, in this circuit, under an objective standard, whether or not [the defendant] intended to intimidate the teller is irrelevant in determining his guilt."); *United States v. Kelly*, 412 F.3d 1240, 1244 (11th Cir. 2005) ("Whether a particular act constitutes intimidation is viewed objectively . . . and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating.").

Accordingly, this Court should grant certiorari to correctly instruct Circuit courts the federal armed bank robbery statute does not require the requisite intentional mens rea and therefore is not a crime of violence under the elements clause of § 924(c)(3)(A).

### B. Intimidation does not require the use or threat of violent physical force.

The government fails to meaningfully address Peterson's principle argument that the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits apply a broad, non-violent construction of "intimidation" when determining sufficiency of the evidence to sustain a bank robbery conviction. Pet. at 12-16. These same Circuits ignore their own broad non-violent "intimidation" sufficiency findings when holding "intimidation" always requires a defendant to threaten the use of violent physical force for crime of violence purposes. Pet. at 12-16 (discussing cases). These inconsistent definitions of "intimidation"—a nonviolent one for sufficiency analysis and a violent one for crime-of-violence analysis—cannot stand.

This Court's recent decision clarifying the "violent physical force" necessary under § 924(c)(3)(A)'s elements clause underscores the Circuits' and the government's misguided analyses. *Stokeling v. United States*, 139 S. Ct. 544 (2019). In *Stokeling*, this Court found Florida's robbery statute requires "resistance by the victim that is overcome by the physical force of the offender" and thus categorically qualifies under the ACCA's elements clause at 18 U.S.C. § 924(e)(2)(B)(i). *Id.* at 549, 554. The federal armed bank robbery statute, in contrast, does not require a defendant to overcome a victim's resistance.

The government erroneously claims a bank robber's demand for money alone constitutes is an implicit threat of violence. Gov. Br. in Opp. at 10-11, *Johnson*, No. 19-7079. Caselaw does not support this argument. As discussed above, a defendant

need not intend (or even act with knowledge) that his or her conduct would intimidate someone. Examples of nonviolent robbery by intimidation set forth in Peterson's petition for certiorari do not satisfy the *Johnson 2010* or *Stokeling* requirement of "violent physical force." Pet. at 13-16. These examples do not contain intended violent physical force, a communicated threat of violent physical force, or resistance by anyone.

Furthermore, the government's implicit threat argument permits mere presumption of a threat of violence. *See* Gov. Br. in Opp. at 9-12, *Johnson*, No. 19-7079. Any such presumption relieves the government of its burden to prove the element of violent physical force beyond a reasonable doubt and is therefore insufficient to satisfy the categorical analysis. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (explaining "elements" are "what the jury must find beyond a reasonable doubt to convict the defendant").

*Stokeling* reiterated the modifier "physical" in § 924(c)(3)(A) "plainly refers to force exerted by and through concrete bodies—distinguishing physical force, from, for example, intellectual force or emotional force." 139 S. Ct. at 552 (quoting *Johnson 2010*, 559 U.S. at 138, 140). While the conduct Peterson cited as examples in his petition for certiorari would likely have been emotionally or intellectually disturbing to the victims, the offenses themselves did not involve any use, attempted use, or threatened use of physical force. The government fails to explain how a non-violent robbery by intimidation could qualify under either *Johnson 2010* or *Stokeling*.

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

The government's argument that armed bank robbery convictions must, by their nature, rise to the level of violent force, Gov. Br. in Opp. at 12-13, 22, *Johnson*, No. 19-7079, ignores that the Ninth Circuit routinely affirms armed bank robbery convictions that do not involve actual weapons, *see* Pet. at 24-25. Such convictions rest on this Court's victim-centered analysis, 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 federal Circuits hold armed bank robbery includes the use of fake guns. *See* Pet. at 24-25 (discussing cases).

In other words, the armed element does not require *the defendant* to use, attempt to use, or threaten 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 a police officer will use force in a way that harms a victim, a bystander, another officer, or even the defendant. The risk is that a weapon's presence will escalate the situation, thereby inducing other people to use violent force. *United States v. Martinez-Jimenez*, 864 F.2d 664, 666-667 (9th Cir. 1989). 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 § 924(c)'s elements clause.

## II. Certiorari is necessary to determine whether "extortion" under the federal armed bank robbery statute, 18 U.S.C. § 2113(a) and (d), requires an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c).

The government does not contest bank robbery by *extortion* lacks an element of violent physical force, instead claiming extortion is divisible from the other means of committing bank robbery: "by force and violence or intimidation." Gov. Br. in Opp. at 21-26. Bank robbery 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." 18 U.S.C. § 2113(a). Peterson relies on his petition, which thoroughly addresses § 2113(a)'s indivisibility. Pet. at 25-31. Because extortion is indivisible from the other means of committing bank robbery, the armed bank robbery statute does not categorically qualify as a crime of violence.

## Conclusion

Circuit courts continue to ignore this Court's precedent on federal armed bank robbery. Section 2113(a) and (d) does not require an intentional mens rea, nor does the statute require the use, attempted use, or threatened use of violent physical force. Although non-violent armed bank robbery convictions are routinely affirmed as sufficient on the evidence, the federal appellate and district courts

continue to hold armed bank robbery is a crime of violence on the false assumption that bank robbery by intimidation requires violent physical force. The resulting conflation amongst the Circuits requires guidance from this Court.

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

Respectfully submitted,

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