No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

MICHAEL WAYNE NORTHCUTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____◆_____

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

_____◆_____

PETITION FOR WRIT OF CERTIORARI

_____◆_____

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QUESTION PRESENTED

Where the circuit courts agree that a conviction under 18 U.S.C. § 2113(a) will be sustained even if the defendant was not aware that his conduct would be perceived as intimidating by anyone, is the Ninth Circuit correct to treat the limiting language "against the person of another" in 18 U.S.C. § 924(c)(3)(A) as mere surplusage, or must a conviction necessarily establish that a defendant was more than negligent as to whether his intentional conduct could harm another before said conviction can serve as predicate offense for the substantial sentencing enhancements under § 924(c)(1) ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF RELATED CASES PURSUANT TO SUPREME COURT RULE 15

While the *mens rea* at issue in ***Borden v. United States***, **Case No. 19-5410**, is recklessness and the one at issue here is negligence, the reasoning, if not the holding, of this Court's decision in *Borden* may be dispositive. This Court granted *Borden*'s petition for Writ of Certiorari on March 2, 2020, and argument is set for November 3, 2020.

Additionally, the following cases, which all have pending writs for certiorari before this Court, raise the issue of whether 18 U.S.C. § 2113(a) can qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A) where a conviction under § 2113(a) does not require proof that the defendant was aware that his conduct could be perceived as intimidating by others:

Blake v. United States, No. 19-6354
Distributed for conference on May 28, 2020

Johnson v. United States, No. 19-7079
Distributed for conference on May 28, 2020

Rogers v. United States, 19-7320
Distributed for conference on June 11, 2020

Simpson v. United States, No. 19-7764
To be distributed for conference on September 29, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Northcutt respectfully petitions this Court for a writ of certiorari to review the Ninth Circuit's order affirming the district court's denial of his 28 U.S.C. § 2255 motion to vacate and correct his sentence, and in so doing refusing Northcutt's request to revisit its previous decision in *United States v. Watson*, 881 F.3d 782, 783 (9th Cir. 2018), holding that 18 U.S.C. § 2113 qualifies as a crime of violence under 18 U.S.C. § 924(c) even though an individual can be convicted of violating § 2113(a) without any awareness that his conduct could be perceived as intimidating.

◆

OPINIONS BELOW

The April 13, 2020 order granting the government's motion for a summary affirmance of the district court decision denying Northcutt's 28 U.S.C. § 2255 motion to vacate and correct his sentence issued by the United States Court of Appeals for the Ninth Circuit is unpublished and reproduced in the appendix to this petition at A1-A2. There was no request for a rehearing.

The April 9, 2019 memorandum decision and order of the United States District Court for the Eastern District of California denying Northcutt's motion to vacate and correct his sentence pursuant to 28 U.S.C. § 2255 is unpublished and reproduced in the appendix at C1-C4.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Northcutt's 28 U.S.C. § 2255 motion was filed on April 13, 2020. Appendix at A1-A2. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1); Supreme Court Rule 13.3; Order, 589 U.S. ___ (March 19, 2020).

PROVISIONS OF LAW INVOLVED

The **Fifth Amendment** to the United States Constitution provides:

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

Under **18 U.S.C. § 924(c)** any person who brandishes a firearm "during and in relation to any crime of violence or drug trafficking crime" is subject to an enhanced mandatory consecutive sentence. Section 924(c)(3) defines a "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

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

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank 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

Northcutt requests certiorari to provide much needed clarification regarding application of this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) in the context of determining whether a conviction that only requires proof that a defendant was negligent regarding the possibility that his intentional conduct could be perceived as intimidating by a reasonable person qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A).

A. The Circuit Courts Are Clear that a Conviction for 18 U.S.C. § 2113 Will Be Sustained Even If a Defendant Was Unaware that his Conduct Could Be Perceived as Threatening, and Paradoxically, the Circuit Courts Are Equally Clear that § 2113 Qualifies as a Crime of Violence.

In *Leocal* this Court held that when a defendant engaged in the intentional conduct of driving while under the influence, which *resulted* in serious harm to another, the offense did not qualify as a crime of violence because the conviction did not require proof that the when the defendant acted, he was aware that his conduct could result in harm to another.[1] *Leocal*, 543 U.S. at 3, 9. As straightforward as that seems, circuit courts across the country are erratically applying this Court's reasoning in *Leocal*, resulting in "a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end." *United States v. Tavares*, 843 F.3d 1, 19 (1st Cir. 2016).

The offense at issue here is bank robbery by intimidation in violation of 18 U.S.C. § 2113.[2] And, just like in *Leocal*, a defendant can be convicted so long as he engaged in intentional conduct that happened to result in harm to another (where the harm in this case is the perception of a threat of bodily injury) without any proof that the defendant was aware his conduct could be perceived as threatening or result in harm to another.

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[1] In *Leocal* this Court addressed the definition of a crime of violence codified at 18 U.S.C. § 16. The elements clause codified at § 16(a) is substantively identical to the elements clause codified at 18 U.S.C. § 924(c)(3)(A).

[2] As is relevant here, bank robbery can committed "by force and violence, or by intimidation." 18 U.S.C. § 2113(a). Because the categorical approach looks at the "minimum conduct criminalized" by a statute, *Moncrieffe v. Holde*r, 133 S. Ct. 1678, 1685 (2013), the inquiry here is limited to bank robbery by intimidation.

For example, in the Ninth Circuit the requisite *mens rea* for bank robbery is established upon proof that the defendant took the property of another through conduct that can objectively be characterized as intimidating, and 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). In other words, the element of "intimidation" is established so long as the defendant willfully engaged 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 that the defendant intended to intimidate anyone. *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). *Accord*, *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016) (explaining that the government's burden of proof to establish bank robbery by intimidation is "low" given that 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. Kelley*, 412 F.3d 1240, 1245-46 (11th Cir. 2005) (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. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (agreeing with the Ninth Circuit that "intimidation is measured. . . under an objective standard,

whether or not [the defendant] intended to intimidate the teller is irrelevant in determining his guilt"); *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); *States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) ("[N]either the plain meaning of the term 'intimidation' nor its derivation from a predecessor statute supports Higdon's argument that a taking 'by intimidation' requires an express verbal threat or a threatening display of a weapon").

Having liability under 18 U.S.C. § 924(c)(3)(A) turn on whether a reasonable person would perceive the defendant's conduct as potentially harmful to another, regardless of whether the defendant understood his conduct could harm another, is the very definition of negligence,[3] *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015), and it is exactly what this Court held in *Leocal* is insufficient to constitute a crime of violence. *Leocal*, 543 U.S. at 9-11. Following the reasoning of *Leocal* the analysis should be whether the defendant's conviction for violating 18 U.S.C. § 2113 necessarily establishes that he is someone who was more than negligent regarding

[3] To recognize that a conviction under § 2113(a) requires nothing more than a showing of negligence with respect to the element of intimidation is not to say that § 2113 is a crime of negligence. Of course it isn't. Complex statutes, such as § 2113(a), have multiple material elements each of which may have a distinct *mens rea*. *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). The *mens rea* pertaining to the actual taking in § 2113(a) is different from the *mens rea* pertaining to intimidation.

whether his intentional conduct could harm another such that it is appropriate to strip a sentencing judge of his/her discretion under 18 U.S.C. § 3553(a) and subject the individual to severe sentencing enhancements on top of the sentence he would otherwise receive for committing the underlying offense—which in Northcutt's case amounts to an additional twenty years in custody.[4]

Yet, notwithstanding the fact that the circuit courts are clear that the element of intimidation under § 2113 is established so long as a reasonable person would have been placed in fear, and it is irrelevant whether the defendant appreciated that his conduct could instill a fear of harm in others—just like the Ninth Circuit held here—the circuit courts are paradoxically equally clear that § 2113 constitutes a crime of violence. *See, e.g.*, *Hunter v. United States,* 873 F.3d 388, 390 (1st Cir. 2017); *United States v. Wilson*, 880 F.3d 80, 84–85 (3d Cir. 2018), *cert. denied*, 138 S. Ct. 2586 (2018); *United States v. McNeal*, 818 F.3d 141, 153–54 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016); *United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293, 295–96 (6th Cir. 2016); *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017); *United States v. Harper*, 869 F.3d 624, 625–27 (8th Cir. 2017); *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018); *United States v. Deiter*, 890 F.3d 1203, 1216 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 647 (2018); *In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016).

[4] If we consider the sentence that Northcutt received in the Central District of California as well, he actually received a total of 25 years on his § 924(c) convictions.

Pursuant to *Leocal*, it cannot be that an offense that requires intentional conduct without any proof that the defendant was aware that his conduct could result in harm to another is a crime of violence where the requisite definition includes the limiting language "against the person of another," as § 924(c)(3)(A) does. Yet, that is what is happening across the circuits in the context of convictions under 18 U.S.C. § 2113. This case, therefore, presents a question of exceptional importance that requires this Court's guidance. Either *Leocal* does not mean what it appears to say, or else federal courts across the country are imposing extremely harsh sentencing enhancements under 18 U.S.C. §§ 924(c) and 924(e), for convictions that lack the requisite *mens rea* to qualify as a crime of violence. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses that do not require proof that a defendant was anything but negligent with respect to whether his use or threatened use of force could harm another.

B. Facts and Procedural History.

During the last three months of 1995, Michael Northcutt, who has a long history of mental health issues dating back to childhood, and who was self-medicating with methamphetamine, committed a number of bank robberies up and down the state of California. According to the Presentence Report, during one of the robberies, a gun he was holding inadvertently discharged and a bullet grazed a teller's arm; witnesses heard Northcutt say "'Oh my God. Is she hurt? Oh

my God. Did I kill her? I didn't mean to hurt anybody,'" before he ran away. PSR ¶¶ 26, 28.

Northcutt was arrested on December 15, 1995 and was charged in the Central District of California with one count of armed bank robbery and one count of using a firearm during a crime of violence in violation of 18 U.S.C. §§ 2113 and 924(c), respectively. He was convicted at trial on both counts and was sentenced to 70 months on the bank robbery and 60 months consecutive on the § 924(c), for a total of 130 months. Northcutt was next sent to the Eastern District of California where he entered into a global plea agreement that addressed his remaining bank robbery charges in both the Eastern and Northern Districts of California. Pursuant to the plea agreement, he pled guilty to three counts of armed bank robbery and one count of using a firearm during a crime of violence in violation of 18 U.S.C. §§ 2113 and 924(c), respectively. He was sentenced to 151 months on each of the three bank robberies, which ran concurrent with each other, and 31 months of the 151 months also ran concurrent with the 70 months he received for the bank robbery in the Central District. Additionally, Northcutt received 240 months for the § 924(c) conviction, which ran consecutive to the other time he was serving. Appendix at D1-D2. In other words, for his three month bank robbery spree in the Central, Eastern and Northern Districts of California, Northcutt received a total of 490 months, or approximately 40 years. His current projected release date from the federal Bureau of Prisons is May 17, 2041.

On June 26, 2015 this Court issued *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"), which held that the residual clause of 18 U.S.C. § 924(e)(2)(B) defining a "crime of violence" in the context of the Armed Career Criminal Act was unconstitutionally vague. On June 22, 2016, Northcutt filed a 28 U.S.C. § 2255 motion in the Eastern District of California court to vacate and correct his sentence on the basis that following *Johnson II* his conviction for using a firearm during and in relation to a crime of violence is unconstitutional.

On the merits Northcutt argued that his conviction for violating § 2113(a) and (d) did not qualify as a crime of violence under § 924(c)(3)(A)—the elements clause—because § 2113 does not require proof that a defendant was anything but negligent with respect to whether a reasonable person would construe his actions as a threat against them and thus § 2113 reaches more conduct than is covered by § 924(c)(3)(A). *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (an offense is categorically overbroad if the least of the acts criminalized are not encompassed under the relevant definition of a crime of violence). Northcutt argued that his conviction under § 924(c) could, therefore, only have been secured under § 924(c)(3)(B)'s residual clause, and thus, pursuant to the reasoning of *Johnson II*, his § 924(c) conviction was sustained in violation of his Fifth Amendment right to due process and must be vacated.

On April 4, 2019, the district court issued a decision denying Northcutt's § 2255 motion on the merits on the basis that after briefing had been completed the Ninth Circuit issued *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018),

which was binding precedent establishing that in the Ninth Circuit, 18 U.S.C. § 2113(a) qualified as a crime of violence under 18 U.S.C. § 924(c)(3)(A). Appendix at C4. On June 19, 2019, the district court granted Northcutt a certificate of appealability with respect to his contention that the residual clause of § 924(c), 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague following *Johnson II*, but denied him a certificate of appealability to challenge the court's ruling that 18 U.S.C. § 2113 qualified as a crime of violence under the elements clause of § 924(c), 18 U.S.C. § 924(c)(3)(A). Appendix at B2-B3.

Northcutt filed a timely notice of appeal with the Ninth Circuit on June 7, 2019. On June 24, 2019, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), which confirmed that the residual clause of § 924(c) was unconstitutionally vague. Northcutt filed an opening brief at the Ninth Circuit, encouraging the court to reconsider *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) given that its holding was premised on a misreading of this Court's decision in *Carter v. United States*, 530 U.S. 255 (2000), and that in reality a defendant can be guilty of violating 18 U.S.C. § 2113 with the same lack of awareness that his intentional conduct could harm another as the defendant in *Leocal*. The Ninth Circuit declined Northcutt's invitation to reconsider *Watson*, and granted the government's motion for summary affirmance, opining that it was "bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." Appendix at A1-A2. (internal quotations omitted).

Where the reasoning of the Ninth Circuit *is* clearly irreconcilable with the reasoning of this Court's decision in *Leocal*, requiring proof that a defendant was more than merely negligent regarding the possibility that his conduct could harm another, Northcutt requests certiorari to clarify that the Ninth Circuit, along with at least ten other circuits, are improperly applying this Court's jurisprudence when determining what constitutes a crime of violence as that term is defined under § 924(c)(3)(A).

REASONS FOR GRANTING THE WRIT

The issue presented here is not whether the defendant is guilty of a serious crime that puts innocent people in harm's way, and it is not whether the defendant intentionally engaged in conduct that a reasonable person would construe as threatening, but whether a defendant's conviction for violating § 2113(a) necessarily establishes that he is someone who was more than negligent regarding whether his conduct would be construed as a threat of violent physical force *against another* such that it is appropriate to subject him to severe sentencing enhancements on top of the already harsh sentence he has received for committing the underlying offense. The answer to that question is clearly "no" under this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), yet the Ninth Circuit and every other circuit court to consider the issue—at least ten—is getting the answer wrong.

When the requisite definition of a crime of violence or violent felony includes the limiting language "against the person of another," we look not to the fact that

the defendant intentionally used force, but instead ask whether, when the defendant engaged in said conduct, did he act with more than negligence with respect to the possibility that his conduct could harm another? *Leocal*, 543 U.S. at 9. 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), or even by the reckless use of force given that nothing in the word "use" alone "applies exclusively to knowing or intentional domestic assaults," *Voisine v. United States*, 136 S. Ct. 2272, 2278-79 (2016). The analysis is different, however, when the narrowing language "against the person or property of another" is added. *Leocal*, 543 U.S. at 9. *See, e.g.*, *United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017) (bemoaning that its hands were tied by a previous panel that had gotten the analysis wrong, the Sixth Circuit explained that unlike the definition of "crime of violence" at issue in *Voisine* which defined a crime of violence as "'the use . . . physical force' *simpliciter*," the definition at issue is substantively different when it "requires 'the use . . . of physical force *against the person of another*'") (emphasis in original).

A. Where there is No Ambiguity in the Ninth Circuit (1) that a Conviction for 18 U.S.C. § 2113 Will Be Sustained When a Defendant was Merely Negligent Regarding the Possibility that His Conduct Could Be Perceived as Intimidating and (2) that a Conviction for § 2113 Constitutes a Crime of Violence under 18 U.S.C. § 924(c)(3)(A), this Case Provides an Excellent Vehicle for this Court to Clarify that the Limiting Language "Against the Person of Another" is Not Surplusage.

In the Ninth Circuit a defendant can be convicted of bank robbery by intimidation where he does nothing more than calmly hand a note to a teller explaining that a bank robbery is in progress and politely requesting the teller to provide him with some money regardless of whether the bank robber was aware of the inherently intimidating nature of his conduct.

For example, in *United States v. Lucas*, 963 F.2d 243 (9th Cir. 1992), the defendant simply 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 Ninth Circuit held that by "opening the bag and requesting the money," Lucas employed the requisite "intimidation," and rejected an insufficiency challenge. *Id.* at 248. There was no evidence that the defendant understood his conduct could be perceived as threatening to anyone.

Indeed, there was no threat to do anything, let alone use violence, if his demand for money was not met. Where there is no threat employed to overcome a victim's resistance, the defendant's conduct was not inherently violent in the sense contemplated by *Johnson v. United States*, 559 U. S. 133 (2010) ["*Johnson I*"]. *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). The Ninth Circuit attempts

to circumvent this reality by employing the untenable assumption that intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson I* standard.'" *Watson*, 881 F.3d at 785 (citing *Johnson I*, 559 U.S. 133). Yet, even the Ninth Circuit has previously recognized that where an offense does not require proof that the defendant was in fact willing to use force, courts cannot simply assume based on their own preconceptions about certain offenses that a defendant necessarily would have used force against another if he did not get what he wanted. *See, e.g.*, *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) (rejecting the government's argument that just because a defendant commits a robbery while armed does not mean the defendant was necessarily willing to use force against another, recognizing that while some robbers "are prepared to use violent force to overcome resistance, others are not").

Just like in *Lucas*, in *United States v. Hopkins*, 703 F.2d 1102 (9th Cir. 1983), the Ninth Circuit had no difficulty holding that the government had established the element of "intimidation" where the defendant had entered the bank, passed a note, spoke "calmly, made no threats, and was clearly unarmed." *Id.* at 1103 (explaining that the element of intimidation is established simply by making a verbal or written demand for money to which one is not entitled). Whether the defendants in *Lucas* and *Hopkins* were "willing" to use or threaten to use violent force is pure speculation; they did nothing to communicate or express that willingness to their victims, and whether they were aware that their victims feared bodily harm "is irrelevant." *Foppe*, 993 F.2d at 1451. *See, e.g.*, *United States*

v. Nash, 946 F.2d 679, 681 (9th Cir. 1991) (confirming "that the threat implicit in a written or verbal demand for money is sufficient evidence to support the jury's finding of intimidation").

Not surprisingly, therefore, district courts in the Ninth Circuit are instructing 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*, 3:16-cr-185, Doc 96 at 9 (D. Oregon, Instructions Filed 1/24/17); *see, e.g.*, *United States v. Johnson*, 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").

Of course the Ninth Circuit is not unique in sustaining convictions under 18 U.S.C. § 2113 where there was no evidence the defendant was aware that others perceived his conduct as threatening violent physical force, let alone made any such threat. For example, 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, and instead informed the teller that he was requesting the money under duress. 550 F.3d 363, 365 (4th Cir. 2008). Indeed, even where a 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" was satisfied so long as the defendant's conduct could be perceived as intimidating to the tellers present regardless of the defendant's awareness of how others perceived his conduct. *See, e.g.*, *United States v. Kelley*, 412 F.3d 1240, 1245-46 (11th Cir. 2005) (holding that the requisite intimidation was established where the defendant lay across a bank counter and helped himself to money in the teller's drawer even though the defendant said nothing); *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"); *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (upholding a § 2113 conviction 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).

Clearly, circuit courts sustaining convictions under 18 U.S.C. § 2113 have not been concerned with whether the defendant had the capacity to place himself in the teller's shoes and appreciate that his conduct would be perceived by others as intimidating. The fact that Northcutt was convicted of violating § 2113(d) does not alter the relevant analysis. The *actus reus* of federal bank robbery does not change whether the violation is for subsection (a) or subsection (d) of the statute. In a

subsection (d) bank robbery, the defendant merely satisfies the act of "intimidation" in a specific manner*, i.e.*, by carrying a dangerous weapon. § 2113(d). Critically, however, the government need not prove an added layer of *mens rea*. The government need not prove that the defendant intended to threaten the individuals in the bank with the weapon or even understood that his possession of said weapon would put others in fear of violent physical force. Indeed, as the Ninth Circuit's model armed bank robbery jury instruction makes clear, all the jury needs to find is that the defendant "made a display of force that *reasonably caused* [*name of victim*] *to fear bodily harm* by using a [specify dangerous weapon or device]." Ninth Circuit's Manual of Model Criminal Jury Instructions, § 8.162 (2010, updated December 2019) (emphasis added).

The enhanced penalties associated with subsection (d) do not arise from the defendant's intent, but from "the greater burdens that [the weapon] imposes upon victims and law enforcement officers," who witness it. *United States v. Martinez-Jimenez*, 864 F.2d 664, 666 (9th Cir. 1989) (holding that a toy gun can therefore qualify as a dangerous weapon under § 2113(d)); *accord United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990). Once again, the concern is the perception of the victim, not the intent of the defendant who may, or may not, have understood his actions to communicate a threat; what the defendant intended with respect to the element at issue here – the threat – is irrelevant.

When it comes to determining whether a bank robbery is a crime of violence under § 924(c), the Ninth Circuit, like its sister circuits, however, is not concerned with the elements of § 2113. Because a reasonable person who is a victim in a bank robbery would likely be in fear of bodily injury, it is of no matter that the bank robber need not actually threaten anyone or even be aware that his conduct might instill in others a fear of bodily harm. *Watson*, 881 F.3d at 785. That reasoning, however, is irreconcilable with *Leocal*. When the definition of a crime of violence includes the limiting language "against the person of another," courts look not at whether a defendant intentionally used force (or intentionally engaged in conduct that a reasonable person would perceive as threatening), but rather at whether the defendant was more than negligent regarding the possibility that said conduct would result in harm to another or be perceived by a reasonable person as threatening harm. *Leocal*, 543 U.S. at 9-10.

When decades of an individual's life is at stake, that distinction matters—as this case illustrates, the fact that a defendant intentionally engaged in conduct that resulted in harm to another does not stand for the proposition "that the offender is the kind of person who might deliberately point the gun and pull the trigger," *Begay v. United States*, 553 U.S. 137, 145-46 (2008), overruled on other grounds by *Johnson II*, 135 S. Ct. at 2558-59 (explaining that where the definition of a crime of violence includes the limiting language "against the person of another," Congress is targeting a narrow class of defendants who have a certain callousness towards

others, those who, at the very least, perceive the risk of harm to others but act anyway).

B. Because the Ninth Circuit, like Its Sister Circuits, Are Misreading *Carter v. United States*, 530 U.S. 255 (2000), It Is Unlikely that *Borden v. United States* (Case No. 19-5410) Will Be Dispositive.

The question presented in *Borden v. United States* (Case No. 19-5410) (cert. granted) is whether the definition of a violent felony under the Armed Career Criminal Act can be satisfied by a conviction that necessarily establishes that when the defendant acted he was recklessness regarding whether his conduct could harm another.

The issue here is negligence, not recklessness, but in reaching the holding, *Borden* almost certainly will require this Court to clarify whether the relevant *mens rea* is the one that modifies simply the use of force, as the Ninth Circuit contends, or whether a prior conviction must categorically establish that when the defendant intentionally used force he had some awareness that his conduct could result in harm to another.

Unfortunately, that clarity alone is likely not enough to resolve this case where the Ninth Circuit misreads *Carter v. United States,* 530 U.S. 255 (2000) for the proposition that a conviction under § 2113 can only be sustained if the government proves the defendant knowingly intimidated someone. *Watson*, 881 F.3d at 785. Of course, proving that a defendant knowingly did something that a reasonable person might perceive as intimidating is very different from proving the

defendant knew he was intimidating anyone. *Carter* seemingly stands for the former proposition, not the latter as the Ninth Circuit contends.

In *Carter v. United States*, this Court determined the *mens rea* that applies to a different element of § 2113 than the one at issue here. Specifically, this Court addressed whether § 2113 requires proof that the defendant had the specific intent to steal. *Carter*, 530 U.S. at 267-68. The defendant argued that § 2113(b) was a lesser included offense of § 2113(a) because, among other reasons, subsection (a) required proof of the specific "intent to steal or purloin," just like subsection (b). *Id.* at 259, 262. This Court rejected that argument. *Id.* at 267-68. As the Court explained, because Congress had not specified any *mens rea* in subsection (a), it was required "to read into [the] statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct," *Id.* at 269 (internal quotations omitted), and thus the government was only required to prove the defendant knew he was stealing, not that he had the specific intent to steal.

This Court explained its reasoning by reference to *Staples v. United States*, 511 U.S. 600 (1994). *Id.* In *Staples* the statute at issue punished a failure to register guns that had certain characteristics and the issue was whether the defendant had to know his gun had the certain characteristics that made it subject to registration. *Staples*, 511 U.S. at 609. This Court held that the defendant had to know the *facts* about his gun that brought it within the scope of the statute. *Id.* at 605; 619. Proving that the defendant knew the facts that made his gun subject to

registration is very different from proving that the defendant knew his gun was subject to registration.

Similarly, as this Court explained, in the context of bank robbery, it is sufficient to separate wrongful from innocent conduct so long as the defendant knows he is taking money that does not belong to him and knows the facts that qualify his conduct as "intimidation." *Carter*, 530 U.S. at 269-70. Just like in *Staples*, so long as the defendant knows the facts that bring his conduct into the reach of the statute, whether the defendant appreciates that his conduct qualifies as the conduct proscribed by the law is irrelevant.

In other words, by holding that § 2113(a) is a general intent crime, *Carter* did no more than recognize that in order to secure a conviction the government simply needs to prove that the defendant knew the facts that brought his conduct into the reach of the statute. *Carter*, 530 U.S. at 269-70 (explaining that requiring a defendant to know the facts that bring him within the reach of § 2113(a) protects "the hypothetical person who engages in forceful taking of money while sleepwalking"). Indeed, where the term "general intent" "may be used to encompass all forms of the mental state requirement," *Bailey*, 444 U.S. at 403, the fact that a defendant stands convicted of a "general intent" crime tells us nothing more than that the defendant knew the facts that should have alerted him that his conduct was proscribed by the statute.

This Court's decision in *Carter*, therefore, is in complete harmony with the negligent *mens rea* circuit courts have historically associated with the element of

intimidation in § 2113(a). Notably, following *Carter*, the government argued to the Eighth Circuit that the "*Carter* Court. . . clearly stated that the *mens rea* for the *actus reus* of bank robbery is satisfied by proof that defendant knew that he was physically taking the money – that he did not forcefully take the money while sleepwalking or some similar situation," and "[s]ince intimidation is determined under an objective standard, defendant's subjective intent is irrelevant." *United States v. Yockel*, Government's Answering Brief, 2002 WL 32144417, at 28-30 (8th Circuit). The Eight Circuit agreed, "reaffirm[ing] that the intimidation element of section 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." *United States v. Yockel*, 320 F.3d 818, 823 (8th Cir. 2003). In so holding the Eighth Circuit relied on the Ninth Circuit's decision in *United States v. Foppe*. *Id.* at 824.

Consistent with the Eighth Circuit, the Third Circuit has likewise reaffirmed that *Carter* did not add an additional layer of proof to secure a conviction under § 2113(a). *United States v. Wilson,* 880 F.3d 80, 87 (3d Cir. 2018). As the *Wilson* court explained, *Carter* merely "stands for the proposition that, because § 2113(a) is a statute requiring only general intent, it is enough for the government to prove that the defendant took knowing action to rob a bank." *Id.* In other words, the government has to prove that the defendant "kn[e]w he was taking money from a financial institution that was not simply giving it away," and the element of intimidation is established where the defendant's acts "would cause an ordinary

bank teller to be intimidated and turn over money that the defendant knew he had no right to have." *Id.* Similarly, subsequent to *Carter*, the Seventh Circuit reaffirmed that the element of intimidation is satisfied "if an ordinary person would reasonably feel threatened under the circumstances." *United States v. Burnley*, 533 F.3d 901, 903 (7th Cir. 2008).

Nevertheless, the Ninth Circuit, along with the First, Fourth, Sixth and Tenth Circuits are misreading *Carter* in the context of assessing whether 18 U.S.C. § 2113 qualifies as a crime of violence. Specifically, the courts have taken the position that when this Court was tasked with determining whether the specific intent to steal required in subsection (b) was likewise an implicit element of subsection (a), and determined that it was not and that all the government was required to prove was a general intent to steal, that what this Court really did was upend decades of jurisprudence by adding an additional layer of proof to subsection (a) such that now the government is also required to prove that a defendant actually knew his conduct would be perceived by others as intimidating. *United States v. Ellison*, 866 F.3d 32, 39 (1st Cir. 2017) (*Carter* "demands" proof that a defendant at least have knowledge with respect to the element of intimidation); *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir. 2016) (following *Carter*, "the government must prove not only that the accused knowingly took property, but also that he knew that his actions were objectively intimidating"); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (following *Carter*, the government must now prove that a defendant "at least kn[e]w that his actions would create the impression in an

ordinary person that resistance would be met by force"); *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) (following *Carter*, "the offense must at least involve the knowing use of intimidation"); and *United States v. Deiter*, 890 F.3d 1203, 1213 (10th Cir. 2018) (following *Carter*, a conviction under § 2113 requires that "the defendant must have at least known his actions were objectively intimidating").

That said, a close reading of the aforementioned cases suggests that the First, Fourth, Sixth, Ninth and Tenth Circuits may not really believe this Court now requires the government to prove beyond a reasonable doubt that a defendant *understood* his actions might be perceived as intimidating by others in order to sustain a conviction under § 2113, but are instead using this Court's description of the *actus reus* of § 2113 for the limited purpose of concluding that § 2113(a) qualifies as a crime of violence. *See, e.g.*, *Ellison*, 866 F.3d at 37 (explaining that intimidation is established by "action by the defendant that would, as an objective matter, cause a fear of bodily harm"); *McNeal*, 818 F.3d at 155 (clarifying that "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"); *McBride*, 826 F.3d 293, 296 ("Intimidation concerns whether an ordinary person would feel threatened under the circumstances"); *Watson*, 881 F.3d at 785 (intimidation "requires that the defendant take property in such a way that would put an ordinary, reasonable person in fear of bodily harm") (internal quotations omitted);

and *Deiter*, 890 F.3d at 1213 ("Every definition of intimidation requires a purposeful act that instills objectively reasonable fear (or expectation) of force or bodily injury") (internal quotations omitted).

If the *Carter* court really did change the definition of the elements necessary to sustain a § 2113(a) conviction to require proof beyond a reasonable doubt that not only did a defendant know the facts about his conduct that a reasonable person would have recognized as intimidating, but the defendant actually had the capacity to understand that his conduct could be perceived by others as intimidating, this Court, in dicta, radically transformed the law surrounding federal bank robbery, and given the high propensity of mentally ill individuals who commit bank robbery, made it extremely difficult for the government to secure a conviction under § 2113(a). Commonsense says that is not what this Court did when it held that § 2113(b) is not a lesser included offense of § 2113(a) on the basis that § 2113(b) requires a specific intent to steal or purloin and § 2113(a) does not. Clarification is, therefore, needed from this Court that *Carter* does not stand for the proposition that the government must prove that a defendant knew his conduct would be perceived as intimidating in order to secure a conviction under § 2113(a), but rather for the proposition that the government need only prove that the defendant was aware of the facts that would have caused a reasonable person to realize that his conduct would be perceived as intimidating by others, *i.e.*, "a negligence standard." *Elonis*, 135 S. Ct. at 2011.

CONCLUSION

For these reasons, Northcutt respectfully requests that the Court grant his petition for a writ of certiorari.

Dated: September 4, 2020

Respectfully submitted,

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