No.

In The Supreme Court Of The United States

Curtis Ward,

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 a Writ of Certiorari

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Dated: December 3, 2020

Question Presented for Review

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." Federal bank robbery does not require—as an element of the offense—the specific intent to use, attempt to use, or threat to use violent physical force. In fact, numerous federal circuits interpret federal bank robbery to include the nonviolent conduct of intimidation and extortion as a request for money.

Does federal armed bank robbery qualify as a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A)?

List of Proceedings

1. U.S. District Court for the District of Nevada, *United States v. Curtis Ward*, Case Nos. 2:08-cr-00224-KJD, 2:16-cv-01443-KJD: Dkt. 58, Order denying motion to vacate and denying a certificate of appealability entered March 31, 2020; Dkt. 59, Judgment entered March 31, 2020.

2. Ninth Circuit Court of Appeals*, United States v. Curtis Ward,* Case No. 20-16061: Dkt. 3, Order denying certificate of appealability entered August 7, 2020.

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Petition for Certiorari

Petitioner Curtis Ward seeks a writ of certiorari to review the order from the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability. Mr. Ward requests this Court grant certiorari, vacate the Ninth Circuit's denial of a certificate of appealability, and remand for further proceedings.

Opinions Below

The district court denied Mr. Ward's 28 U.S.C. § 2255 motion to vacate his Count Three 18 U.S.C. § 924(c) conviction and attendant 7-year mandatory, consecutive imprisonment term. The district court's order and denial of a certificate of appealability is provided in Appendix ("App.") A. The district court's final judgment is provided in App. B.

Mr. Ward timely appealed the district court's denial to the Ninth Circuit Court of Appeals and requested a certificate of appealability. The Ninth Circuit denied Mr. Ward a certificate of appealability, which is provided in App. C.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order on August 7, 2020. App. C-7. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This Petition is timely under Supreme Court Rule 13.3 and this Court's Order of March 19, 2020, extending the deadline from 90 days to 150 days to file a petition for a writ of certiorari after the lower court's order denying discretionary review.

Relevant Statutory Provisions

1. 18 U.S.C. § 924(c)(3) defines "crime of violence" as:

> [A]n offense that is a felony and—
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> (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.

2. 18 U.S.C. §§ 2113(a) and (d) define 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
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> 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 Curtis Ward is serving the last 7 years of his 17-year prison term—the term imposed for an unconstitutional conviction. The 7-year term is the mandatory, consecutive term the district court imposed for his 18 U.S.C. § 924(c) conviction on the notion that federal armed bank robbery qualifies as a predicate a "crime of violence." It does not. Armed bank robbery can be committed under 18 U.S.C. §§ 2113(a) or (d) by intimidation and without specific intent to harm. Armed bank robbery does not require the use, attempted use, or threatened use of violent physical force. Armed bank robbery only ever qualified as a crime of violence under § 924(c)'s now-void residual clause.

However, Mr. Ward was convicted under 18 U.S.C. § 924(c) in 2009 without the benefit of this Court's residual clause decisions in *Johnson* and *Davis*. *See Johnson v. United States*, 576 U.S. 591 (2015); *United States v. Davis*, 139 S. Ct. 2319 (2019). *Johnson* implicitly and *Davis* explicitly voided § 924(c)(3)(B)'s residual clause, dramatically limiting qualifying predicate crimes of violence. Federal armed bank robbery under 18 U.S.C. § 2113(a), (d) is now an offense that no longer qualifies as a crime of violence post-*Johnson* and *Davis*. Mr. Ward requests certiorari to correct the Ninth Circuit's deviation from established federal law.

I. Mr. Ward was convicted of and received a mandatory, consecutive sentence for violating 18 U.S.C. § 924(c)—possessing a firearm in during and in relation to a crime of violence identified as federal armed bank robbery under 18 U.S.C. §§ 2113(a), (d).

Mr. Ward pled guilty in 2009 without a plea agreement to armed bank robbery under 18 U.S.C. § 2113(a) and (d) (Count One), possession of a firearm during and in relation to a crime of violence, identified as the bank robbery charged

in Count One, under 18 U.S.C. § 924(c) (Count Two), and unlawful possession of a firearm or ammunition under 18 U.S.C. § 922(g)(1) (Count Three). The district court sentenced Mr. Ward to 17 years in prison consisting of concurrent 10-year terms on the bank robbery and firearm possession charges, and a consecutive 7-year term on the § 924(c) charge. Mr. Ward did not pursue a direct appeal.

II. After Mr. Ward's conviction was final, this Court voided as unconstitutionally vague the residual clauses of several federal statutes, including 18 U.S.C. § 924(c)(3)(B).

After Mr. Ward's conviction was final, this Court in *Johnson* struck down as unconstitutionally vague under the Due Process Clause the residual clause of the Armed Career Criminal Act ("ACCA") in 18 U.S.C. § 924(e). 576 U.S. at 606. This Court held *Johnson* announced a new substantive rule retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). In *Davis*, this Court also struck down as unconstitutionally vague under the Due Process Clause the residual clause of 18 U.S.C. § 924(c)(3)(B). *Davis*, 139 S. Ct. at 2336 (2019).

III. Mr. Ward moved to vacate his 18 U.S.C. § 924(c) conviction and sentence under 28 U.S.C. § 2255, but the lower courts denied relief despite Johnson and Davis.

Mr. Ward timely moved to vacate his § 924(c) conviction and sentence under 28 U.S.C. § 2255 in the District of Nevada. He argued federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) no longer qualifies as a crime of violence under 18 U.S.C. § 924(c). Given *Johnson* and *Davis* and without § 924(c)(3)(B)'s now-void residual clause, Mr. Ward argued federal armed bank robbery is not a crime of violence because it cannot meet § 924(c)(3)(A)'s force clause. The district court disagreed and denied relief, holding armed bank robbery satisfies the force clause under the Ninth Circuit's decision in *United States v. Watson*, 881 F.3d 782 (9th

Cir.), *cert. denied*, 139 S. Ct. 203 (2018). App. A 3-4. The district court also denied a certificate of appealability. App. A-4.

Mr. Ward timely appealed to and requested a certificate of appealability from the Ninth Circuit. *United States v. Ward,* No. 20-16061, Dkt. 2 (9th Cir. July 1, 2020). The Ninth Circuit denied relief, summarily holding Mr. Ward had not shown "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." App. C-7 (alteration in original) (citations omitted).

Reasons for Granting the Petition

This Court's recent opinions have struck portions of unconstitutional statutes besieged with vagueness. In *Davis*, this Court struck as unconstitutionally vague the residual clause of 18 U.S.C. § 924(c)(3)(B), an ambiguous statutory provision that caused impermissible inconsistency and discord in federal circuit and district courts. 139 S. Ct. at 2336. However, without the residual clause to support "crime of violence" predicates and sustain § 924(c) convictions, lower courts are now stretching the legal parameters of the force clause in § 924(c)(3)(A) beyond its permissible limits to avoid vacating convictions that should rightfully be vacated.

For instance, federal circuit courts of appeal continue to stand firm in erroneously holding federal armed bank robbery under 18 U.S.C. § 2113 qualifies as a crime of violence under § 924(c)'s remaining force clause, even though § 2113 criminalizes conduct that does not require either specific intent to harm anyone or the use, attempted use, or threatened use of violent force. The text of § 924(c)'s force clause does not support the federal circuit courts' position.

Certiorari is thus requested to ensure federal courts exclude § 2113(a), (d) as a "crime of violence" under § 924(c), as armed bank robbery does *not* statutorily require a defendant to use intentional, violent, physical force. This case presents a question of exceptional importance for those like Mr. Ward serving mandatory, consecutive prisons sentences under § 924(c) on the premise that § 2113(a) and (d) convictions remain crimes of violence despite this Court's decision in *Davis*. This case also presents an excellent vehicle to settle the issue, as Mr. Ward is serving only the unconstitutional portion of his 7-year § 924 sentence in federal prison.

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

Section 924(c) provides 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 called the force clause or elements clause. The second clause, § 924(c)(3)(B), is called the residual clause. This Court invalidated § 924(c)(3)(B) in *Davis*, holding the residual clause violates due process as it is unconstitutionally vague. 139 S. Ct. at 2336.

A decision of this Court applies retroactively to cases on collateral review when 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." *Welch*, 136 S. Ct. at 1265 (cleaned up). In *Welch*, this Court found Johnson, 576 U.S. 591, 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.

Just as *Johnson* is a substantive holding voiding the ACCA's residual clause, *Davis* is a substantive holding voiding § 924(c)'s residual clause. *Davis* altered mandatory sentencing law and rendered innocent a class of people once subject to § 924(c) liability based on predicate offenses falling solely within its now-defunct residual clause. *Davis* thus definitively alters the range of conduct and class of persons punishable under § 924(c). *Davis* is, therefore, retroactive.[1]

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

Mr. Ward's 18 U.S.C. § 924(c) conviction and 7-year sentence rest on the Ninth Circuit's opinion in *Watson*, 881 F.3d 782, that federal armed bank robbery

[1] Indeed, the Solicitor General in *Davis* conceded a finding that § 924(c)(3)(B) is unconstitutionally vague would be retroactive on collateral review because that would be a substantive rule. *See* Brief for the United States, *United States v. Davis*, Sup. Ct. No. 18-431 (Feb. 12, 2019), at 52 ("A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review.").

under 18 U.S.C. § 2113(a) and (d) is a crime of violence. However, post-*Davis*, § 924(c)(3)(B)'s residual clause can no longer anchor a crime of violence predicate or preserve a § 924(c) conviction—only § 924(c)(3)(A)'s force clause can do so. The federal armed bank robbery statute, however, does not require "as an element the use, attempted use, or threatened use of physical force against the person or property of another" as required by the force clause. 18 U.S.C. § 924(c)(3)(A). Federal armed bank robbery therefore does not meet the force clause of § 924(c).

A. The categorical approach applies to determine whether 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 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 2256.

In undertaking the categorical approach, 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); *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)). *Mathis*, 136 S. Ct. at 2248.

Two requirements must be met to satisfy the "violent force" component of the force clause. First, the predicate offense must require *physical force* be used, attempted, or threatened to meet § 924(c)'s force 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 interpreted *Johnson 2010*'s "violent physical force" definition to encompass physical force with the "potentiality" of causing physical pain or injury to another. *Stokeling*, 139 S. Ct. at 554. Second, the use, attempted use, or attempted use of physical force must be *intentional*, 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).[2]

Federal armed bank robbery can be committed "by force and violence, or by intimidation . . . or . . . by extortion." 18 U.S.C. § 2113(a), (d). Applying the categorical approach, armed bank robbery by intimidation and bank robbery by extortion fall at the least egregious end of § 2113(a)'s range of covered conduct.

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[2] This Court is presently deciding *Borden v. United States*, No. 19-5410 (argument held Nov. 3, 2020), which addresses whether the "use of force" clause in the ACCA encompasses crimes with a mens rea of mere recklessness.

Because armed bank robbery by intimidation or 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) force clause.

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

The Fourth, Fifth, Ninth, and Eleventh Circuits incorrectly apply the categorical approach to define "intimidation" under 18 U.S.C. § 2113. These circuits define "intimidation" broadly for sufficiency purposes and affirm § 2113 convictions involving non-violent conduct that does not involve the use, attempted use, or threatened use of violent force. Yet, despite this broad definition, these same circuits also find "intimidation" always requires as an element the use, attempted use, or threatened use of violent force under § 924(c)'s force clause. These circuits cannot have it both ways.

"Intimidation" does not meet § 924(c)'s force clause. The problematic precedential bank robbery decision the Ninth Circuit relied to deny Mr. Ward relief—*Watson*—illustrates why. *Watson* did not acknowledge this Court's prior case law interpreting and applying the federal bank robbery statute. 881 F.3d 782. And, *Watson* also creates inter-circuit conflicts. Resolution of these conflicts is necessary to bring comity to cases adjudicating whether "intimidation" establishes a crime of violence for federal convictions and mandatory, consecutive sentencing penalties.

1. Intimidation does not require the use, attempted use, or threatened use 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 (cleaned up). 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). Thus, 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).

Federal bank robbery, however, 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). Intimidation in a federal bank robbery 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. Because federal bank robbery can readily be accomplished by intimidation, it lacks the requisite element of use, attempted use, or threatened use of violent physical force.

To find federal bank robbery by intimidation a crime of violence under § 924(c), *Watson* made two assumptions: (1) an act of intimidation necessarily involved a separate willingness to use violent physical force; (2) 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 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* does not heed or address *Holloway*.

Second, the Ninth Circuit elsewhere acknowledges "[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). The government argued in *Parnell* that anyone who robs a bank harbors an "uncommunicated willingness or

readiness" to use violent force. *Id.* The Ninth Circuit rejected the government's argument, 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* did not heed or address the Ninth Circuit's own recognized distinction.

Third, even if a defendant was willing to use violent physical force, an intimidating act does not require the defendant to communicate any such willingness to the victim. And, 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 v. United States*, 135 S. Ct. 2001, 2008 (2015) (defining "threat"). Examining bank robbery by intimidation cases reveals numerous circuit affirmances for evidentiary sufficiency despite the lack of even threatened violent physical force.

For example, in *United States v. Lucas*, the Ninth Circuit found intimidation under § 2113 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 based on 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 Cir. 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 the victims. The defendants never threatened to use violent physical force against anyone. *Lucas* and *Hopkins* demonstrate bank robbery does not require the use, attempted use, or threatened use of "violent" physical force.

Other federal circuit affirmances of bank robbery by intimidation convictions also illustrate that threats of violent physical force are not required to sustain a conviction. For example, the Tenth Circuit, in *United States v. Slater*, 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. 692 F.2d 107, 107-08 (10th Cir. 1982). The *Slater* 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 that, under the crime of violence analysis, intimidation necessarily requires "a threatened use of physical force." *United States v. Salas*, 889 F.3d 681, 681 (10th Cir. 2018).

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 the 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 the defendant left the bank. *Id.* Paradoxically, the Fourth Circuit also holds 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.), *cert. denied*, 137 S. Ct. 164 (2016).

The Fifth Circuit 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, the Fifth Circuit also inconsistently holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *Meoli v. Huntington Nat'l Bank*, 848 F.3d 716, 716 (6th 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 said nothing 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 on sufficiency grounds. But when determining whether bank robbery categorically qualifies as a crime of violence under § 924(c), these same circuits find "intimidation" *always* requires a defendant to threaten the use of violent physical force. These dueling definitions of "intimidation" are impermissibly inconsistent and injudicious.

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 force clause.

2. Intimidation is a general intent crime.

Section 924(c)'s force 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 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 to § 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 force 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 insufficient 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," requiring no 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) (internal

quotations 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 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 prove 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 must exist to commit robbery by intimidation. *Hopkins*, 703 F.2d at 1103. But to satisfy § 924(c)'s force 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 force 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." *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 use of 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. & Constr. Trades Dep't,* 770 F.3d 834, 838 (9th Cir. 2014) (holding wrongful use of 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, *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*, 136 S. Ct. 1629, 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 bank robbery statute's plain language provides another reason extortion does not encompass violent force. Section 2113(a) expressly provides 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, to "give

effect, if possible, to every clause and word of a statute," extortion under § 2113(a) must not be read to require violent force. *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 force 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 of the "use of a dangerous weapon or device" through "assault[]" or by "put[ting] in jeopardy the life of any person." 18 U.S.C. § 2113(d). The "armed" element and *Watson*'s terse mention of it, however, does not render bank robbery a crime of violence under 18 U.S.C. § 924(c)'s force clause for at least three reasons.

First, *Watson* did not address the armed element of § 2113(d) 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 (internal citations omitted). Thus, armed bank robbery can be committed by intimidation, just as bank robbery, and does not meet the force clause's requirements for violent physical force.

Second, this Court applies a subjective standard to § 2113(d) from the victim's viewpoint. Bank robbery convictions can be sustained where the victim's

reasonable belief about the nature of the item used in a robbery determines whether it was a dangerous "weapon or device" 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 actually a toy gun. *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, cannot 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" under § 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" by referring to "its potential to injure people directly" and also the risk its presence will escalate the tension in a situation, inducing others to use violent force. *Martinez-Jimenez*, 864 F.2d at 666-67. The armed element does not require the defendant to use a

dangerous weapon or device violently against a victim. Rather, the statute is satisfied where the item used in the robbery (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. *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) force 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 (citation omitted). 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 apply the modified categorical approach and review certain judicial documents to assess whether the defendant was convicted of an alternative element that meets the force 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 shows 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*. *See Watson*, 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 established "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—the disjunctive "or"—suggests, *Gregory* notes "force and violence," "intimidation," and "extortion" are three separate ways of taking

property, each of which will independently 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. 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.) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery under 18 U.S.C. § 2113(a)."), *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 (quoting *United States v. Almeida*, 710 F.3d 437, 440 (1st Cir. 2013) (alteration and emphasis added by *Williams*). Bank robbery, the Fourth Circuit wrote, has a single "element of force and violence, intimidation, or extortion." *Williams*, 841 F.3d 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) may be divisible into two crimes at most: robbery (under the first paragraph) and entering a bank intending 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, § 2113(a)'s text 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 faces 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 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

For these reasons, Petitioner Curtis Ward requests the Court grant a Writ of Certiorari.

Respectfully submitted,

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