No. _____

In the

# Supreme Court of the United States

**CALVIN THOMAS,** Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

## Petition for Writ of Certiorari

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# Questions Presented

1. Whether Hobbs Act robbery under 18 U.S.C. § 1951 is a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A), where the offense encompasses threats of harm to intangible property and economic interests, and thus does not categorically require the use, attempted use, or threat of violent physical force?

2. Whether federal bank robbery under 18 U.S.C. § 2113(a) and (d) be a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), where the offense fails to require any intentional use, attempted use, or threat of violent physical force?

## Statement of Related Proceedings

- *United States v. Calvin Thomas,*
  5:96-cr-00006-RT-3 (C.D. Cal. Dec. 17, 1997)
- *United States v. Calvin Thomas,*
  98-50014 (9th Cir. Feb. 1, 2000)
- *United States v. Calvin Thomas,*
  00-50185 (9th Cir. Oct. 30, 2001)
- *Calvin Thomas v. United States,*
  5:17-cv-00168-TJH (C.D. Cal. Jul 26, 2017)
- *Calvin Thomas. v. United States*,
  17-56123 (9th Cir. Oct. 28, 2020)

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**CALVIN THOMAS,** Petitioner

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## Petition for Writ of Certiorari

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Calvin Thomas petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability in his case.

### Opinions Below

The Ninth Circuit's order denying Mr. Thomas's application for a certificate of appealability ("COA") was not published. (App. 1a.) The district court issued a written order denying Mr. Thomas's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and denying his request for a certificate of appealability. (App. 2a-5a.)

### Jurisdiction

The Ninth Circuit issued its order denying Mr. Thomas a COA on October 28, 2020. (App. 1a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## Statutory Provisions Involved

18 U.S.C. 1951 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

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 . . .

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.

## Introduction

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 576 U.S. 591 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598. Among that number was Calvin Thomas. He argued that, after *Johnson*, Hobbs Act robbery was no longer a valid predicate crime of violence for purposes of § 924(c). He argued that, after *Johnson*, neither Hobbs Act robbery nor armed bank robbery were valid predicate crime of violence for purposes of § 924(c). The Ninth Circuit stayed Mr. Fields' case while both questions worked their way through the Court, and then declined to grant him a certificate of appealability after his argument was foreclosed by *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020) (holding that Hobbs Act robbery is categorically a crime of violence) and *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018).

This Court should grant certiorari to reconsider *Dominguez*'s holding that Hobbs Act robbery remains a crime of violence after *Johnson*. Model jury

instructions nationwide, and actual jury instructions given in the Ninth Circuit, establish that Hobbs Act robbery can be premised on a threat of harm to economic interests and intangible property. That broad definition of property cannot be squared with the force clause, which requires the use or threatened use of *physical* force against property. The Ninth Circuit's contrary decision here should be revisited.

The Ninth Circuit's holding on armed bank robbery is likewise worthy of review. A number of circuits have held that federal bank robbery by intimidation—conduct that does *not* require any specific intent or any actual or threatened violent force—qualifies as a crime of violence under the elements clauses. At the same time, those same courts have acknowledged an ever decreasing bar for what constitutes "intimidation" in the context of *sufficiency* cases. The courts cannot have it both ways—either bank robbery requires a threat of violent force, or it doesn't, but the same rule must apply to both sufficiency cases and to the categorical analysis. Given the heavy consequences that attach to a bank robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of caselaw into order.

## Statement of the Case

Mr. Thomas was convicted, following a jury trial, of: (1) armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (Count 1); (2) interference

with commerce by robbery ("Hobbs Act robbery"), in violation of 18 U.S.C. § 1951 (Count 3); (3) assaulting a federal officer with a deadly weapon, in violation of 18 U.S.C. § 111(a)(1), (b) (Count 5); and (4) three counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 2, 4, and 6). *United States v. Fields*, 210 F.3d 386, *1 n.3 (9th Cir. 2000). On December 16, 1997, he was sentenced to 610 months imprisonment under the then-mandatory Sentencing Guidelines—70 months on Counts 1, 3, and 5, each to be served concurrently, plus a mandatory consecutive 60 months on Count 2 (the first Section 924(c) conviction), 240 months on Count 4 (the second Section 924(c) conviction), and 240 months on Count 6 (the final Section 924(c) conviction).

On May 20, 2016, Mr. Thomas filed a timely motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his Section 924(c) conviction should be vacated under *Johnson* because Hobbs Act robbery and armed bank robbery were no longer a crimes of violence.

After full briefing, the district court denied Mr. Thomas's claims, and declined to grant a certificate of appealability as to any claim, holding that both Hobbs Act robbery and armed bank robbery remained crimes of violence, even in the absence of the residual clause. (App. 2a-4a.) Petitioner filed a request for a certificate of appealability in the Ninth Circuit, supported by full briefing on the standard and the reasons for granting the COA. The

Ninth Circuit denied it in an order citing *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020). and *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), but not further analyzing the question. (App. 1a.) *Watson* is the Ninth Circuit's precedential decision finding armed bank robbery to be a crime of violence after *Johnson*. *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020), is the Ninth Circuit's precedential decision holding Hobbs Act robbery to be a crime of violence.

## Reason or Granting the Writ

### A. This Court Should Grant Certiorari to Decide Whether Hobbs Act Robbery Satisfies the Force Clause of Section 924(c).

The Court should grant the writ of certiorari to address the Ninth Circuit's conclusion that the Hobbs Act robbery has, as an element, the use, threatened use, or attempted use of physical force. It does not: Hobbs Act robbery can be premised on a threat of harm to intangible property and threats of economic harm. Given the heavy consequences that attach to a Section 924(c) conviction based on Hobbs Act robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of caselaw into order.

#### 1. The categorical approach determines whether an offense is a crime of violence.

In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court struck the

residual clause in 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague. As the government has conceded elsewhere and as the circuit courts have uniformly concluded, *Davis* is a substantive rule that applies retroactively to motions to vacate brought under 28 U.S.C. § 2255. *See*, *e.g.*, *King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020) (noting government concession).

After *Davis*, only one portion of the crime-of-violence definition remains intact: the force clause. To qualify under the force clause, an offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). An offense fails to satisfy that force clause unless it requires: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) a use or threatened use of force that is intentional and not accidental or negligent, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

**2. Hobbs Act robbery does not require violent physical force.**

Hobbs Act robbery does not satisfy the force clause because it does not require violent physical force. The Hobbs Act prohibits "obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery." 18 U.S.C. § 1951(a). "Robbery" is defined as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1).

Property, for purposes of the Hobbs Act, is defined broadly to include "intangible, as well as tangible, property." *United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases) (describing the Circuits as "unanimous" on this point). And fear of injury includes things like "anxiety . . . about economic loss or harm," *United States v. Brown*, 11-cr-334-APG, Dkt. 197 (D. Nev. July 28, 2015) (providing Hobbs Act robbery jury instruction that "property" includes "money and other tangible and intangible things of value" and fear as "an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm") or "worry over expected personal harm or business loss, or over financial or job security." *United States v. Nguyen*, 2:03-cr-00158-KJD-PAL, Dkt. 157, at 28 (D. Nev. Feb. 10, 2005). Because juries in the Ninth Circuit are actually instructed that such harms are cognizable forms of injury for purposes of Hobbs Act robbery, and because such threats do not constitute

threats of *physical* force, the offense does not satisfy the force clause of § 924(c).

These Ninth Circuit cases are not an anomaly; in fact, there is a long history of broadly defining property for purposes of the Hobbs Act. The Third, Tenth, and Eleventh Circuits use pattern instructions that define Hobbs Act robbery to include fear of future injury to intangible property. *See* Third Circuit Model Criminal Jury Instructions, 6.18.1951-4 and 6.18.1951-5 (Jan. 2018) (defining "fear of injury" as when "a victim experiences anxiety, concern, or worry over expected personal (physical) (economic) harm" and "[t]he term 'property' includes money and other tangible and intangible things of value")[1]; Tenth Circuit Criminal Pattern Jury Instructions, 2.70 (Feb. 2018)(providing definitions for Hobbs Act robbery: "'Property' includes money and other tangible and intangible things of value. 'Fear' means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.")[2]; Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (Feb. 2020) (defining terms in Hobbs Act robbery instruction: "Property' includes money, tangible things of value, and intangible rights that are a source or

[1] Available https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions.

[2] Available https://www.ca10.uscourts.gov/clerk/downloads/criminal-pattern-jury-instructions.

element of income or wealth. 'Fear' means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.")[3] And cases from both inside and outside those circuits have used a similar formulation of the jury instruction to charge juries. *See United States v. Kamahele*, No. 2:08-cr-00758-TC, Doc. 1112 at 42, 44-45 (D. Utah Oct. 6, 2011) (defining "property" as "money and other tangible and intangible things of value," and "fear" to include "an apprehension, concern, or anxiety about … economic loss"); *United States v. Buck*, No. 4:13-cr-491, Dkt. 412-1, at 16 (S.D. Tex. Aug. 28, 2015); *United States v. Tibbs*, No. 2:14-cr-20154-BAF-RSW-1, Dkt. 34, at 20 (E.D. Mich. Aug. 29, 2014).

The Modern Federal Criminal Jury Instructions likewise define Hobbs Act robbery to include a fear of future harm to intangible property. Specifically, the Modern Instructions define "property" as "includ[ing] money and other tangible and intangible things of value which are capable of being transferred from one person to another." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-4 (Nov. 2020). Robbery by "fear" is defined as "fear of injury, whether immediately or in the future," including "[t]he use or threat of force or violence . . . aimed at . . . causing *economic* rather than

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[3] Available https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227.

physical injury." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-5 (Nov. 2020) (emphasis added). Moreover, the "fear of injury" exists where "a victim experiences anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-6 (Nov. 2020).

As one district court of the Ninth Circuit recently held, such a broad reding of "property" and "injury" aligns with the best textual reading of § 1951. *United States v. Chea*, 2019 WL 5061085, at *9 (N.D. Cal. Oct. 2, 2019). The statute prohibits taking property "by means of actual or threatened force, or violence" *or* "fear of injury. The latter phrase would be superfluous if "injury" were limited to physical injury—it is hard to imagine a use of threatened force or violence" that wouldn't also satisfy the "fear of injury" definition. To avoid surplusage, the injury clause should be read to encompass something more than physical injury, just as the above model instructions do.

In spite of these authorities, a number of Circuits have held that Hobbs Act robbery is a crime of violence. The uniformity in their conclusion is undermined by the lack of concurrence in their reasoning. Several of the courts did not consider any argument about intangible property or economic

injury argument at all.[4] The Ninth Circuit explicitly refused to analyze intangible property or economic injury, finding that there was no realistic probability of Hobbs Act robbery conviction premised on economic injury. *Dominguez*, 954 F.3d at 1260; *see also United States v. García-Ortiz*, 904 F.3d 102, 106-09 (1st Cir. 2018) (reaching similar conclusion). The Fourth Circuit, on the other hand, found that the Hobbs Act did not distinguish between threats of injury to tangible and intangible property—along the lines of the model instructions above—but concluded that § 924(c) likewise encompassed both tangible and intangible property.

Neither of these positions is tenable. No court until *Mathis* had ever suggested that § 924(c)'s definition of crime of violence includes threats of physical force to intangible property or to economic interests—nor did the Fourth Circuit explain how one could threaten to apply physical force to intangible property or economic interests.

But the Ninth Circuit's approach is equally wrong. The Ninth Circuit recognized: "Fear of injury is the least serious way to violate [Hobbs Act

[4] *See United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060-66 (10th Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *In re St. Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016).

robbery], and therefore, the species of the crime that we should employ for our categorical analysis." *Dominguez*, 954 F.3d at 1254, 1260. Even so, it explicitly declined to analyze whether intangible economic interests would satisfy the force clause, "because Dominguez fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." 954 F.3d at 1260. This ignores that prosecutors in the Ninth Circuit have sought and obtained convictions using jury instructions that authorize conviction under that theory. *See United States v. Brown*, No. 11-cr-334-APG, Dkt. 197 (D. Nev. July 28, 2015); *United States v. Nguyen*, 2:03-cr-00158-KJD-PAL, Dkt. 157 at 28 (D. Nev. Feb. 10, 2005). No legal imagination is required to find a realistic probability of prosecution under a particular theory where juries are actually instructed that the theory is a cognizable one upon which to return a verdict. Indeed, the Ninth Circuit's own caselaw makes this point. *See United States v. Baldon*, 956 F.3d 1115, 1125 (9th Cir. 2020) (finding a realistic probability of prosecution where the theory is included in the state's model jury instruction).

The Hobbs Act robbery statute cannot mean one thing when a prosecutor tries to convict someone of the substantive offense, and another thing when a petitioner claims that the statute is overbroad—and yet that is the state of the law at this moment. Given the high stakes involved in

imposing a Section 924(c) enhancement, this Court's intervention is necessary to correct the Circuit's inconsistent application of the law.

### B. This Court Should Also Grant Certiorari to Decide Whether Armed Bank Robbery Satisfies the Force Clause of Section 924(c).

The Court should grant the writ of certiorari to address whether bank robbery has, as an element, the use, threatened use, or attempted use of physical force.

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

First, intimidation for purposes of 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 force on a bank teller, it does not require a threat of violent force must be "capable" of "potentially" "causing physical pain or injury" to another, *Stokeling*, 139 S. Ct. at 554.

For example, in *United States v. Lucas*, 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 (9th Cir. 1992). The Ninth Circuit held that by "opening the bag and requesting the money," the defendant employed "intimidation," and sustained the conviction. *Id.* at 248. Because there was no threat--explicit or implicit--to

do anything, let alone use violence, if that demand was not met, the minimum conduct necessary to sustain a conviction for bank robbery does not satisfy *Stokeling*'s standard for a crime of violence under the elements clause.

Likewise, in *United States v. Hopkins*, the defendant 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). When the teller said she had no hundreds or fifties, the defendant responded, "Okay, then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The trial evidence showed the defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.* But the Ninth Circuit affirmed, holding "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.*

Despite the fact that the Ninth Circuit has concluded that such minimal conduct is sufficient to sustain a conviction, the Ninth Circuit concluded in *Watson* that bank robbery *always* requires the threatened use of violent physical force. This decision cannot be squared with the Circuit's sufficiency decisions and means that either the Ninth Circuit is ignoring this Court's decisions setting out the standard for violence---or, for decades, people have been found guilty of crime of bank robbery who simply aren't guilty. Either way, the matter requires this Court's intervention.

This pattern of inconsistent holdings applies broadly across the circuits. *See United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing); *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (upholding bank robbery by intimidation conviction where the defendant gave a teller a note that read, "These people are making me do this," and then the defendant told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500."); *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987) (upholding conviction for robbery by intimidation where there was no weapon, no verbal or written threat, and when the victims were not actually afraid, because a reasonable person would feel afraid); *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005) (upholding conviction 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, did not speak to any tellers at the bank, did not shout, and did not say anything when they ran from the store). All of these courts have applied a non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction, but have held that "intimidation" *always* requires a defendant to

threaten the use of violent physical force. These positions cannot be squared.

The Ninth Circuit reached its conclusion by asserting that bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson I* standard.'" 881 F.3d at 785 (citing *Johnson 2010*, 559 U.S. 133). It is wrong, however, to equate *willingness* to use force with a threat to do so. Indeed, the Ninth Circuit has previously acknowledged this very precept. In *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016), the government argued that a defendant who commits a robbery while armed harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. In finding that Massachusetts armed robbery statute does not qualify as a violent felony, the Court rejected the government's position and held that "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id. Watson* failed to honor, or even address, this distinction.

Certiorari is necessary to harmonize these contradictory lines of cases.

**2. Federal bank robbery is a general intent crime.**

Second, the elements clause of Section 924(c) and the career offender enhancement requires that 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 bank robbery by intimidation, the defendant need not *intentionally* intimidate.

This Court holds § 2113(a) "contains no explicit *mens rea* requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). This Court held in *Carter* that federal bank robbery does not require an "intent to steal or purloin." *Id*. In evaluating the applicable mens rea, this Court emphasized it would read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id*. at 269.

The *Carter* Court 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)," *id*., but found no basis to impose a specific intent in § 2113(a), *id*. at 268-69. Instead, the Court determined "the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of general intent—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation)." *Id*. at 268.

This Court's classification of § 2113(a) as a general intent crime in *Carter* means the statute requires nothing more than knowledge—a lower mens rea than the specific intent required by the elements clause. Consistent with *Carter*, the Ninth Circuit holds juries need not find intent in

§ 2113(a) cases. Rather, in the Ninth Circuit, a finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. This is not enough to classify an offense as a crime of violence.

For example, in *United States v. Foppe*, the Ninth Circuit held a jury need not find the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The Ninth Circuit held a specific intent instruction was unnecessary because "the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation." *Id.* Nowhere in *Foppe* did the Ninth Circuit suggest that the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see also Hopkins*, 703 F.2d at 1103 (approving instruction stating intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear).

Other circuits' decisions are in accord: bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent.

*United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (citation omitted) ("The 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. . . . [N]othing in the statute even remotely suggests that the defendant must have intended to intimidate."); *Kelley*, 412 F.3d at 1244 ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating.; *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

As this Court has recognized, an act that turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks," requires only a negligence standard, not intent. *Elonis*, 135 S. Ct. at 2011. Because jurors in a bank robbery case are called on only to judge what a reasonable bank teller would feel--as opposed to the defendant's intent--the statute cannot be deemed crime of violence.

In sum, *Watson*'s sub silentio holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Consequently, this Court should grant certiorari to clarify that bank robbery cannot be a crime of violence under the elements clause, because general intent "intimidation" does not satisfy that standard.

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

The fact that Mr. Thomas was found guilty of armed bank robbery, which requires proof a defendant "use[d] a dangerous weapon or device," does not undermine his arguments. 18 U.S.C. § 2113(d). Indeed, *Watson* did not address the armed element of armed bank robbery other than to state that because "[a] conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery," "armed bank robbery 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.

Moreover, the "dangerous weapon or device" standard is less pernicious than it seems. For one thing, because the standard applies from the point of view of the victim, a "weapon" was dangerous or deadly if it "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986).

Relying on *McLaughlin*, the Ninth Circuit affirms armed bank robbery convictions that do not involve actual weapons. In *United States v. Martinez-Jimenez*, for example, the defendant entered a bank and ordered people in the lobby to lie on the floor while his partner took cash from a customer and two bank drawers. 864 F.2d 664 (9th Cir. 1989). The defendant "was holding an object that eyewitnesses thought was a handgun" but was in fact a toy gun he purchased at a department store. *Id.* at 665. His partner testified that

"neither he nor [the defendant] wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives." *Id.* Yet, the defendant was guilty of armed bank robbery even where: (1) he did not "want[] the bank employees to believe [he] had a real gun," and (2) he believed anyone who perceived the gun accurately would know it was a toy. Such a defendant does not intend to threaten violent force.

Other federal circuits also hold armed bank robbery includes the use of fake guns. "Indeed, every circuit court considering even the question of whether a fake weapon that was never intended to be operable has come to the same conclusion" that it constitutes a dangerous weapon for the purposes of the armed robbery statute. *United States v. Hamrick,* 43 F.3d 877, 882-83 (4th Cir.1995); *see e.g., United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon for purposes of § 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett,* 3 F.3d 390, 391 (11th Cir.1993) (same); *United States v. Medved,* 905 F.2d 935, 939 (6th Cir.1990) (same).

Indeed, this Court's reasoning in *McLaughlin* holds that an unloaded or toy gun is a "dangerous weapon" for purposes of § 2113(d) because "as a consequence, it creates an immediate danger that a violent response will ensue." 476 U.S. at 17-18. Thus, circuit courts including the Ninth Circuit

define a "dangerous weapon" with reference to not only "its potential to injure people directly" but also the risk that its presence will escalate the tension in a given situation, thereby inducing *other people* to use violent force. *Martinez-Jimenez*, 864 F.2d at 666-67. In other words, the armed element does not require *the defendant* to use a dangerous weapon violently against a victim. Rather, the statute can be satisfied where the defendant's gun (even if a toy) makes it more likely that a *police officer* will use force in a way that harms a victim, a bystander, another officer, or even the defendant. *Id.* A statute does not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone *other than* the defendant.

In other words, *Watson* is correct that the "armed" part of armed bank robbery does not control.

#### 4. The federal bank robbery statute is indivisible and not a categorical crime of violence under 18 U.S.C. § 924(c).

The federal bank robbery statute is not a crime of violence for a third reason--the federal bank robbery statute includes both bank robbery and bank extortion. Because bank extortion does not require a violent threat, and because the statute is not divisible, this overbreadth is fatal.

The Ninth Circuit did not reach the question of whether bank extortion can be accomplished without fear of physical force--though the caselaw makes clear that it can. *United States v. Valdez*, 158 F.3d 1140, 1143 n.4 (10th Cir.

1998) (observing that "an individual may be able to commit a bank robbery under the language of 18 U.S.C. § 2113(a) 'by extortion' without the threat of violence"). Rather, with little analysis, the Court concluded that bank robbery and bank extortion were divisible portions of the statute. *Watson*, 881 F.3d at 786. This analysis gives short shrift to this Court's divisibility opinions.

Where a portion of a statute is overbroad, a court must determine whether the overbroad statute is divisible or indivisible. *Mathis*, 136 S. Ct. at 2249. 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. And only when a statute is divisible may courts then review certain judicial documents to assess whether the defendant was convicted of an alternative element that meet the elements clause. *Id.* at 262-63.

*Watson* summarily held the federal bank robbery statute was 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)). The sources it cited do not establish that § 2113(a) is divisible--indeed, each indicates the exact opposite: that force and violence, intimidation, and extortion are indivisible means of satisfying a single element.

*Eaton* does not make the case for divisibility. *Eaton* points out that bank robbery is defined 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). But it goes on to note that the "essential element" of bank robbery "could [be] satisfied . . . through mere 'intimidation.'" This seems to make the opposite case--that the element is a wrongful taking, and that violence, intimidation, and extortion are merely means of committing the offense.

*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, and in so doing, notes that bank robbery "covers not only individuals who take property from a bank 'by force and violence, or by intimidation,'" as defendant Jennings did," "but also those who obtain property from a bank by extortion." *Jennings*, 439 F.3d at 612. A statement of the statutes coverage does not affect the divisibility analysis.

*Watson* also failed to cite *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which held that "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. In the course of reaching that 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).

Other circuits have similar decisions. The First Circuit specifically holds that § 2113(a) "includes both 'by force and violence, or intimidation' and 'by extortion' as separate *means* of committing the offense." *United States v. Ellison*, 866 F.3d 32, 36 n.2 (1st Cir. 2017) (emphasis added). 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 Criminal Jury Instructions of the Seventh Circuit 539 (2012 ed.) (emphasis added). The Third Circuit agrees. *United States v. Askari*, 140 F.3d 536, 548 (3d Cir. 1998) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery."), *vacated on other grounds*, 159 F.3d 774 (3d Cir. 1998).

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." 841 F.3d at 659. Bank robbery, the Court wrote, has a single "element of force and violence, intimidation, or extortion." *Id.* at 660.

And the Sixth Circuit, without deciding the issue, noted § 2113(a) "seems to contain a divisible set of elements, only some of which constitute violent felonies—taking property from a bank by force and violence, or intimidation, or extortion on one hand and entering a bank intending to commit any felony affecting it . . . on the other." *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017).

Section 2113(a), in other words, may be divisible into two crimes at most: robbery (under the first paragraph) and entering a bank with the intent to commit a felony (under the second paragraph). But the robbery offense is not further divisible; it can be committed through force and violence, *or* intimidation, *or* extortion. These three statutory alternatives exist within a single set of elements and therefore must be means.

In addition to the caselaw making this point, the statute's history confirms bank robbery is a single offense that can be accomplished "by force

and violence," "by intimidation," or "by extortion." Until 1986, § 2113(a) covered only obtaining property "by force and violence" or "by intimidation." *See United States v. Holloway*, 309 F.3d 649, 651 (9th Cir. 2002). A circuit split ensued over whether the statute applied to wrongful takings in which the defendant was not physically present inside the bank. H.R. Rep. No. 99-797 sec. 51 & n.16 (1986) (collecting cases). Most circuits held it did cover extortionate takings. *Id.* Agreeing with the majority of circuits, the 1986 amendment added language to clarify that "extortion" was a means of extracting money from a bank. *Id.* ("Extortionate conduct is prosecutable [] under the bank robbery provision. . . ."). This history demonstrates Congress did not intend to create a new offense by adding "extortion" to § 2113(a), but did so only to clarify that such conduct was included within bank robbery. Obtaining property by extortion, in other words, is merely an alternative means of committing robbery.

Because § 2113(a) lists alternative means, it is an indivisible statute. And because the Ninth Circuit disregarded this Court's caselaw when it reached the opposite conclusion, the Court should grant this petition.

## Conclusion

For the foregoing reasons, Mr. Thomas respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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