No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JUAN REYES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____

KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520

Counsel for Petitioner

QUESTION PRESENTED

Federal bank robbery, 18 U.S.C. § 2113(a), is a general intent offense, *see Carter v. United States*, 530 U.S. 255, 268 (2000), and the statute doesn't require the defendant to intend to intimidate anyone. The statute also doesn't require a defendant to use or threaten to use violent physical force to intimidate.

Under this Court's precedents, predicate crimes of violence must involve the intentional use of force, *see Borden v. United States*, 141 S. Ct. 1817, 1830 (2021), and the physical force must be "capable of causing physical pain or injury." *See*, *e.g.*, *Stokeling v. United States*, 139 S. Ct. 544, 553-54 (2019).

Petitioner challenged his 18 U.S.C. § 924(c) conviction alleging that the predicate offense, federal bank robbery, was not a categorical crime of violence. The district court denied relief, and the Court of Appeals denied a certificate of appealability, citing its own caselaw holding that federal bank robbery is a crime of violence.

The question presented is:

> Can reasonable jurists debate whether federal armed bank robbery by intimidation, under 18 U.S.C. § 2113(a), is a crime of violence under the elements clause of 18 U.S.C. § 924(c) because the offense doesn't require any intentional use, attempted use, or threatened use of violent physical force?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

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Petitioner, Juan Reyes, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The order denying Petitioner's certificate of appealability is unpublished, and a copy is attached to this Petition in the Appendix. *See* App-1.

The district court's order denying habeas relief was also unreported. A copy of this order is also included in the Appendix. *See* App-2 to App-6.

JURISDICTION

The Ninth Circuit's order denying Petitioner's certificate of appealability was filed on September 24, 2021. This Court therefore has jurisdiction over this timely

petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3. *See Hohn v. United States*, 524 U.S. 236 (1998) (holding Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. const. amend v

18 U.S.C. § 924(c)(3)

18 U.S.C. 2113(a)

28 U.S.C. § 2553

The **Fifth Amendment to the Constitution** provides, in pertinent part, that no person shall "be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 924(c)(3) defines "crime of violence" as "an offense that is a felony and":

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, 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. § 2113(a), the federal bank robbery statute, reads, in pertinent part:

> (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; …

Shall be fined under this title or imprisoned not more than twenty years, or both.

28 U.S.C. § 2253 governs an appeal from the denial of habeas relief, and provides, in part:

(a) In a habeas corpus proceeding … before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

…

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
…

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner was indicted for one count of federal armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and one count of brandishing a firearm in relation to a "crime of violence," in violation of 18 U.S.C. § 924(c)(1). The indictment alleged that the bank robbery was the predicate "crime of violence" for the § 924(c) charge. Petitioner pleaded guilty to both charges, pursuant to a plea agreement that included appellate and collateral attack waivers.

For the bank robbery, he was sentenced to 30 months in custody. For the § 924(c) conviction, he received the mandatory sentence the statute provided: seven years, consecutive to the bank-robbery sentence.

Four years later, this Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), striking the "residual clause" of § 924(c)(3)(B) as unconstitutionally vague. Petitioner, acting pro se, filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his sentence, citing *Davis*. After counsel was appointed, Petitioner filed an amended motion, arguing that under *Davis* his bank robbery conviction could not be a § 924(c)(3)(A) predicate crime of violence. Armed bank robbery could be committed by intimidation only, and intimidation did not require using or threatening violent physical force against a person, as § 924(c)(3) required. All that is required is that a defendant intentionally make a show of force that another perceives as threatening. *See*, *e.g.*, *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983).

The district court denied relief, relying on Ninth Circuit authority holding that armed bank robbery is a crime of violence under the elements clause of § 924(c)(3). *See* App-4 to App-5 (citing *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018)). The court denied a certificate of appealability. *See* App-5 to App-6.

Petitioner filed a timely notice of appeal and a request for a certificate of appealability, arguing that the issue was debatable and specifically pointing out that this Court frequently reevaluated the *mens rea* required for § 924(c) crimes of violence. Nevertheless, on September 24, 2021, the Ninth Circuit denied Petitioner's request for a certificate of appealability, citing its own caselaw holding that armed bank robbery is a § 924(c)(3) crime of violence. *See* App-1 (citing *Watson*, 881 F.3d 782).

REASONS FOR GRANTING THE PETITION

I. Federal bank robbery is not a categorical match for a § 924(c) "crime of violence."

To determine whether a predicate offense is a crime of violence, this Court applies the familiar categorical approach. *See*, *e.g.*, *Moncrieffe v. Holder*, 569 U.S 184, 190 (2013). Under this approach, the defendant's actual conduct is "quite irrelevant," *see id.*, and the Court "ignor[es] the particular facts of the case." *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Instead the Court looks to the "minimum conduct criminalized by the [predicate] statute," and presumes the prior conviction rested upon nothing more than this minimum conduct. *Moncrieffe*, 569 U.S. at 190-91. If the statute of conviction "covers more conduct than the generic offense"—here a

§924(c)(3) crime of violence—then the prior conviction is not a qualifying predicate offense. *See Mathis*, 136 S. Ct. at 2248.

For § 924(c), the generic definition of a "crime of violence" is "an offense that is a felony" and that "has 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). "Physical force," must be applied intentionally and cannot be used recklessly or negligently. *See*, *e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004). Just last term, in *Borden v. United States*, 141 S. Ct. 1817, 1834 (2021), the Court addressed whether an offense could be a "violent felony" under ACCA if it could be committed recklessly; it held it could not. Instead, a violent felony under 18 U.S.C. § 924(e)—which is an offense that has as "an element the use, attempted use, or threatened use of physical force against the person of another"—required a higher *mens rea* than recklessness or negligence, and required the "active employment of force against another person." *See id.* at 1834. A violent felony requires a mental state that is deliberate, purposeful, or knowing. *See id.* at 1830.

Additionally, the physical force must be must be "violent," physical force that is "capable of causing physical pain or injury." *See*, *e.g.*, *Stokeling v. United States*, 139 S. Ct. 544, 553-54 (2019) (physical force is force capable of causing physical injury) (citing *Johnson v. United States*, 133, 140 (2010) ("*Johnson I*")); *Johnson I*, 559 U.S. at 140-41 (construing "physical force" in definition of "violent felony" to mean "force capable of causing physical pain or injury to another person").

Applying these principles here, the Court should grant the Petition because it is at least fairly debatable whether armed bank robbery is a § 924(c) crime of violence. Federal armed bank robbery can be committed by intimidation, which does have as an element the use, attempted use, or threatened use of force, and it does not require the intentional use of violent physical force. Reasonable jurists could debate whether it is a categorical match for a § 924(c)(3)(A) crime of violence.

A. Federal bank robbery, which can be committed by intimidation only, does not have as an element the use, attempted use, or threatened use of force.

The bank robbery statute at issue here, § 2113(a), explicitly does not require the use of force. Instead, because it permits a conviction for anyone who, "by force and violence, *or by intimidation*" robs a bank, "the "minimum conduct" penalized by § 2113(a), is explicitly listed as "intimidation." *See* 18 U.S.C. § 2113(a). And the circuits are clear that intimidation can be—and frequently is—committed without any use, attempted use, or threatened use of force. *See*, *e.g.*, *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) (holding that verbal threats or threatening displays of a weapon are not required for intimidation element of § 2113(a)); *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (noting that "we have previously held that express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapons are not required for a conviction for bank robbery by intimidation") (cleaned up) (citation omitted). Not only is there no requirement that a defendant threaten the use of force, but there is certainly no requirement that he

threaten to use force capable of causing physical pain or injury to another. *See Stokeling*, 139 S. Ct. at 554.

Examples from the caselaw bear this out. For instance, handing an "emphatic note" to a teller—without making an explicit threat or displaying a weapon—was sufficient to establish intimidation. *See United States v. Hensen*, 945 F.2d 430, 439-440 (1st Cir. 1991). There, the defendant handed a note to the teller that read, "Put fifties and twenties into an envelope now!!" Though there was no explicit threat to use force, the note was sufficient to establish intimidation and sustain the conviction because it caused the teller to reasonably feel intimidated. *See id.* Similarly, a defendant's bank robbery by intimidation conviction was upheld where he put his plastic shopping bags on a teller's window with a note reading, "Give me all your money, put all your money in the bag," and told the teller, "Put it in the bag." *United States v. Lucas*, 963 F.2d 243, 244 (9th Cir. 1992). Though the defendant didn't threaten to use any force or display a weapon, the teller was "terrified," so the Ninth Circuit found sufficient evidence of intimidation and upheld the conviction. *Id.* at 249.; *see also Higdon*, 832 F.2d at 315-16 (finding sufficient evidence of intimidation where defendant did not make any explicit threat to use force or use a weapon, and only ordered tellers to put "money in the bag," open the bank vault, and lie on the floor).

In another case, the defendants were found guilty of bank robbery by intimidation even though they didn't use a weapon, give the teller a note, make any demands to the teller, or even speak any words. *See United States v. Kelley*, 412 F.3d

1240, 1245 (11th Cir. 2005). Instead, they jumped on the bank counter and started grabbing cash out of the unlocked cash drawer. *See id.* at 1243. The tellers were "really scared" by the noise the defendants made when they jumped on the counter. This was sufficient to establish the required intimidation because threatening force wasn't required—it was only required that the teller feel threatened. *Id.* at 1245.

It is § 2113(a)'s focus on what the teller perceives that leads to bank robbery convictions without any use or threat of force. In *Hopkins*, the defendant walked into a bank and presented a demand note that read, "Give me all your hundreds, fifties and twenties. This is a robbery." 703 F.2d at 1103. The teller said she had no hundreds or fifties, so the defendant said, "Okay, then give me what you've got." After the teller went to the bank vault, the defendant "left the bank in a nonchalant manner." *Id.* Despite the complete lack of any threat of violence or force—and that the defendant "spoke calmly, made no threats, and was clearly unarmed"—the bank robbery by intimidation conviction was sustained because the teller felt intimidated and frightened. *See id.* Yet another example is a case where the defendant simply helped himself to money in the tellers' cash drawers, without "overtly threaten[ing]" anyone with harm, or even speaking or interacting with anyone, other than telling a bank manager to "shut up" when she asked what he was doing. *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982). The court upheld the conviction, finding the intimidation element was met by the defendant's conduct, even without any "verbal threats" or a weapon." *Id.* at 109.

As these cases demonstrate, there is no requirement to threaten physical force for someone to be convicted of § 2113(a). As long as a teller feels intimidated by what the defendant did—calmly asking for money, taking money out of the cash drawer, or making noise as they go about their robbery—the conviction will be sustained. And not only is there no requirement of a threat to use force, but § 2113(a) doesn't require any threat to use the type of force this Court has said is required: physical force capable of causing pain or injury to anyone. *See*, *e.g.*, *Stokeling*, 139 S. Ct. at 554. Asking for hundreds or fifties, and leaving the bank in a nonchalant manner doesn't explicitly or implicitly threaten to use the type of force that would harm anyone. *See Hopkins*, 703 F.2d at 1103.

That courts will sustain bank robbery convictions for intimidation despite the lack of any threat to use force, physical or otherwise, demonstrates that it is debatable whether a § 2113(a) conviction is a categorical crime of violence under § 924(c)(3)(A)'s force clause. The clause requires an element of the use, attempted use, or threatened use of physical force. Yet the text of § 2113(a) does not require the threatened use of force, the circuits have confirmed that a threat of force is not required, and the caselaw supports this. It is at least debatable whether federal bank robbery by intimidation contains an element of the threatened use of force so that it is a categorical match for a § 924(c) crime of violence. Given this, the standard for a certificate of appealability—that the issue be fairly "debatable," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)—was met. Petitioner did not need to "show that he should prevail on the merits," *see Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), but only

needed to demonstrate a "substantial showing of the denial of a constitutional right" to receive a certificate of appealability. 28 U.S.C. § 2253(c)(2). Petitioner met that standard in light of the caselaw showing that no threat to use any type of physical force, violent or otherwise, is required to sustain a § 2113(a) conviction. The Court should grant the Petition and order the issuance of a certificate of appealability.

B. The *mens rea* for federal bank robbery by intimidation doesn't satisfy the requirement for a crime of violence because there is no requirement that a defendant intentionally use or threaten to use force.

A § 2113(a) conviction is not a categorical § 924(c) crime of violence for another reason—the statute does not require intentional conduct, and, in fact, permits the reckless or negligent conduct that this Court has said is not permissible for a crime of violence. *See*, *e.g.*, *Borden*, 141 S.Ct. at 1834; *Leocal*, 543 U.S. at 12-13.

Section 2113(a) is a general intent crime, so a defendant can commit federal bank robbery by intimidation without intentionally intimidating anyone. As this Court explained in *Carter v. United States*, bank robbery under § 2113(a) "contains no explicit *mens rea* requirement of any kind." 540 U.S. 255, 267 (2000). Subsection (a) requires only "proof of general intent—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here the taking of another by force and violence or intimidation)." *Id.* at 268.

What this means is that a defendant must know a bank teller feels intimidated—but he doesn't have to intend it. *Knowing* that he is taking money from a teller by intimidation is very different from *intending* to take property from a teller

by intimidation. A bank robber can know that a teller is frightened and then leave with the bank's money, even if he did not go into the bank intending to frighten or intimidate anyone. Under *Carter* he would still be guilty of intimidation even if he didn't intend to put the teller in fear.

Once again, the cases bear out this interpretation of § 2113(a)'s *mens rea*. The circuits agree that whether the defendant intended to intimidate the bank teller is completely irrelevant; all that matters is whether the bank teller felt intimidated. *See*, *e.g.*, *Kelley*, 412 F.3d at 1244 ("A defendant can be convicted under § 2113(a) even if he did not intend for an act to be intimidating."); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) ("whether or not [the defendant] intended to intimidate the teller is irrelevant to determining his guilt"); *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) ("nothing in the statute even remotely suggests that the defendant must have intended to intimidate."); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (holding that "whether [the defendant] specifically intended to intimidate [the bank teller] is irrelevant" for a § 2113(a) conviction); *see also United States v. Wilson*; 880 F.3d 80, 87-88 (3d Cir. 2018) (holding that § 2113(a) is a crime of violence under career offender provision because it requires knowing—but not intentional—use of intimidation); *Watson*, 881 F.3d at 785 (holding that § 2113(a) requires only knowing use of intimidation, but not intentional use of intimidation); *United States v. Ellison*, 866 F.3d 32, 37-38 (1st Cir. 2017) (intimidation is judged by an objective standard from the reasonable person's

perspective, and § 2113(a) only requires the defendant to know his actions are intimidating).

And because the defendant doesn't have to intend to intimidate the bank teller, a § 2113(a) conviction could result from reckless conduct. Suppose a person walks into a bank knowing that he presents what some might view as an intimidating presence: he is tall with a large, hulking build, and he has a deep, gruff voice that makes him sound mean even when he doesn't mean to. While he is aware that others may perceive his presence as intimidating, he doesn't intend to threaten anyone with physical force or to make them feel frightened or intimidated. He simply wants them to follow the directions in his note, and he in fact tries to decrease the risk that anyone will feel intimidated by drafting a polite note that says "Please put all your money in the bag." He is aware that the teller may be intimidated by him, or by bank robbers in general, but he doesn't intend to intimidate anyone, and he never makes any threats to anyone in the bank. In fact, he never utters a word. He simply doesn't appreciate the fear that his actions provoke in the teller—he either underestimates it or disregards it because he thinks he is acting calmly and being polite. On these facts, he would be convicted of § 2113(a) even though he never threatened anyone with physical force, if the teller reasonably felt intimidated by his actions in demanding money. And his conviction could then later be deemed a § 924(c) crime of violence warranting an increased mandatory sentence.

The fact that § 2113(a) doesn't have a specific intent *mens rea*, and is satisfied by a lower *mens rea* of either knowledge or recklessness, means that bank robbery by

intimidation is not a categorical crime of violence because § 924(c)(3)(A) requires intentional conduct. *Borden* was clear that crimes of violence "are best understood to involve … a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk." 141 S. Ct. at 1830. Conduct that is not purposely "targeted at another" is excluded from the "crime of violence" definition. *See id.* at 1833. The Court explained that imposing harsh mandatory sentences on those who had committed predicate violent crimes made sense if the violent crimes were "'purposeful, violent, and aggressive crimes," *id.* (quoting *Begay v. United States*, 553 U.S. 137, 145-46 (2008)), but not if the priors were for reckless or negligent conduct. *See* 141 S. Ct. at 1830-31. As Justice Thomas explained in his concurrence, the term "use of physical force" applies only to "intentional acts designed to cause harm." 141 S. Ct. at 1835 (Thomas, J., concurring).

Section 2113(a)'s general intent *mens rea* cannot be squared with the requirement that crimes of violence must involve intentional, purposeful, targeted conduct. The statute cannot be a categorical crime of violence since jurors are called only to determine whether a reasonable teller feels intimidated—and not whether the defendant intended to intimidate or threaten anyone.

Given this, it is at least "fairly debatable" whether federal bank robbery by intimidation is a categorical match for a § 924(c) crime of violence. The standard for a certificate of appealability was therefore met, *see Slack*, 529 U.S.at 484, and this Court should grant the Petition and order the issuance of a certificate of appealability.

II. This case is a good vehicle to resolve the issue.

Petitioner briefed in his § 2255 petition whether a federal bank robbery conviction qualifies as a categorical crime of violence, arguing that it can be committed without threatening the use of force, and that the Ninth Circuit's precedent did not account for the insufficient *mens rea* in § 2113(a), which was not a match for the purposeful requirement in § 924(c). Further, though the district court and the Ninth Circuit denied a certificate of appealability, both cited the Ninth Circuit's precedent in *Watson*, 881 F.3d 782, which holds that federal bank robbery by intimidation is a § 924(c) crime of violence. *See* App-4 to App-6.

While Petitioner has argued that the issue is at least fairly debatable, given the statutory language and the caselaw, the propriety of a certificate of appealability largely merges into the merits of the question presented. Resolving the issue of whether § 2113(a) is a categorical match for § 924(c)(3)(A) would ultimately affect the outcome of Petitioner's § 2255 petition, and any remaining issues could be addressed on remand after that threshold issue is resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Dated: December 23, 2021

Respectfully submitted,

KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520
Counsel for Petitioner