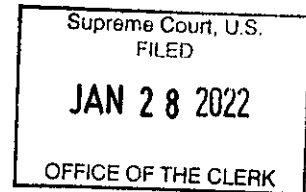


No. 21-7369

IN THE
SUPREME COURT OF THE UNITED STATES



DENNIE SIMON PARKER, SR. - PETITIONER
(Your Name)

vs.

United States of America - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DENNIE SIMON PARKER, SR.
(Your Name)

UNITED STATES PENITENTIARY-McCREARY
Post Office Box 3000
(Address)

Pine Knot, Kentucky 42635
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

Whether the ruling from this Court in *Carter v. United States*, 530 U.S. 255, 268, 210 S.Ct. 2159, 147 L.Ed. 2d 203 (2000), that bank robbery under 18 U.S.C. §2113(a) "requires proof of general intent," a decision that is precedent or an opinion as the government assert.

Whether the indictment and district court's jury instructions failing to include the essential mens rea element with respect to the law of bank robbery under 18 U.S.C. §2113(a) affects the accused substantial rights and seriously affected the fairness of the judicial proceedings.

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

NONE

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
CARTER V. UNITED STATES, 530 U.S. 255 (2000).....	3, 6, 10, 11, 12, 16
ELONIS V. UNITED STATES, 575 U.S. 723 (2015).....	7, 9, 15
UNITED STATES V. ALI, 991 F.3d 561 (4 th Cir. 2021).....	12, 13, 15
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OTHER

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 6, 2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 9, 2021, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bank Robbery provides in relevant part:

Second element: the defendant... took money from another by force and violence, or by acting in an intimidating manner;

18 U.S.C. § 2113(a)

Bank Robbery requires "proof of general intent — that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (the taking of property of another by force and violence or intimidation).

Carter v. United States, 530 U.S. 255, 268, 120 S.Ct. 2159, 147 L.Ed. 2d 203 (2000).

STATEMENT OF THE CASE

DANNIE PARKER was charged in a single-count indictment with bank robbery in violation of 18 U.S.C. §2113(a). The case came on for trial before a jury. At the close of the evidence the district court instructed the jury three elements. Instructing the jury on the second element that the government had to prove that the money was taken by "force and violence" OR "by acting in an intimidating manner;" defining "intimidation" to mean:

The phrase "by intimidation" means that the defendant did or said something knowingly or intentionally that would make an ordinary, reasonable person fear bodily harm. The government must prove beyond a reasonable doubt that the defendant knowingly and intentionally did or said something that would cause a reasonable person under the circumstances to be fearful of bodily harm. It is not necessary for the government to prove that the victim was actually frightened or to — that was actually frightened to establish that the defendant acted in an intimidating manner. You may, however, consider evidence concerning whether a

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STATEMENT OF THE CASE

bank employee was actually placed in fear of bodily harm as evidence of how a reasonable person would have reacted.

The district court failed to instruct the jury on the mens rea element of bank robbery under 18 U.S.C. § 2113(a), to wit: that the accused knew that he was creating an impression for an ordinary teller that resistance to his request for money would be met with force. The district court also failed to instruct the jury that "intimidation" entails a threat to use violent physical force, and not merely a threat to cause bodily injury.

The Petitioner failed to object to both omissions during jury instructions. The district court's jury instructions are reviewed under the plain error standard.

The Petitioner moved the district court for a judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure before the verdict, and after the verdict for insufficient of the evidence of "force and violence or by intimidation" element. The district court denied both times.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals For The Fourth Circuit has decided an important question of federal law that seems to have already been settled by this Court now it seems in conflict with this Court's ruling.

This Court ruled in *Carter v. United States*, that bank robbery under §2113(a) requires "proof of general intent." See 530 U.S. 255, 268 120 S.Ct. 2159, 147 L.Ed. 2d 203 (2000).

The law with respect to the mens rea element of bank robbery under 18 U.S.C. §2113(a) was settled in this circuit at the time of the trial. "[T]o secure a conviction of bank robbery 'by intimidation' the government must prove not only that the accused knowingly took property, but also that he knew that his actions were objectively intimidating." *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir. 2016). Accord *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) ("the prosecution must prove that the defendant possessed 'general intent - that is knowledge - with respect to taking property by intimidation.") See also, *United States v. Ellison*, 866 F.3d 32, 39 (1st Cir. 2017) ("the defendant must at least know that his actions would create the

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impression in an ordinary person that resistance would be met by force.")

Put differently, the prosecution must show the defendant knew "the facts that made his conduct fit the definition of the offense." *Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001, 192 L.Ed. 2d 1 (2015). This Court confronted this precise issue involving the transmission of a threat in violation of 18 U.S.C. § 875 (c). The jury had been instructed that the government need only prove that a reasonable person would regard the defendant's communications as threats — regardless of what the defendant thinks. In reversing the Third Circuit and ordering a new trial, this Court stated:

Elonis's conviction... was premised solely on how his posts would be understood by a reasonable person.... Having liability turn on whether a "reasonable person" regards the communication as a threat — regardless of what the defendant thinks — "Reduces culpability on the all-important element of the crime to negligence..."

In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the

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government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state.

The Petitioner failed to object to the jury instructions, the district court's jury instructions are reviewed for plain error. To prevail on appeal the Petitioner must show: (1) there was error; (2) the error was clear or obvious, rather than subject to reasonable dispute; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed. 2d 508 (1993).

The Petitioner complained in the Court of Appeals that the district court's jury instructions not including the essential mens rea element was error that affected his Substantial Rights putting in question whether the error had a prejudicial impact on the jury's deliberation.

The Respondent argues that even if the district

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Court committed plain error in failing to instruct the jury on the Petitioner's "general intent" a new trial is not warranted because there was overwhelming evidence that the Petitioner "took cash from the bank by acting in an intimidating manner."

The Petitioner argues that should not be the relevant question of law. The relevant inquiry is whether there was overwhelming evidence that the Petitioner "knew/understood" that his conduct would be viewed as objectively intimidating — that is, that he "knew" that his actions would create the impression in an ordinary person that resistance would be met by violent physical force. Not only was the evidence on this critical point not overwhelming at trial — perhaps because the government believed that the Petitioner's efforts to appear non-threatening were irrelevant to the case — the government's presentation of evidence focused exclusively on the subjective view of the teller with whom he interacted. At a minimum, it presented reasonable doubt for a properly instructed jury, (cf., *Elonis v. United States*, *supra*) and the district court's failure to properly instruct the jury on this "critical element" undermines confidence in the underlying proceeding. *United States v.*

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Lockhart, 947 F.3d 187, 192-93 (4th Cir. 2020).

The Respondent states that the Petitioner focuses his discussion on the law surrounding the intimidation element and since this Court issued an opinion in *Carter* which requires "proof of a general intent" to intimidate, and the government must prove... that the accused knew that his actions were objectively intimidating don't exist and the appropriate question is whether an ordinary person in the teller's position reasonably could infer the threat of bodily harm from the accused acts.

The Respondent insist that the Petitioner's knowledge is irrelevant, and therefore focuses its argument exclusively on the teller's subjective response to the accused. Intimidation is satisfied if "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation." citing *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996)

The *United States v. McNeal* panel acknowledging *Woodrup* presented the issue of whether bank

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Robbery by intimidation requires a specific intent to intimidate... Thus, we had no occasion to consider whether bank robbery requires general intent (i.e., knowledge) with respect to intimidation. And, second, Woodrup's definition of intimidation by reference to a reasonable person says nothing about whether the defendant must know that his conduct fits the definition."

In 2000, however, the Supreme Court ruled in *Carter* that bank robbery under §2113(a) requires "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 by intimidation.)" 818 F.3d at 155.

The Respondent insist that there is no requirement instructing on the mens rea element and doesn't exist neither in the statute, nor in the circuit's precedents, nothing in the statute even remotely suggests that the accused must have intended to intimidate. This Circuit's precedents do not require that a district court instruct the jury that "the accused must know that his actions would create the impression in an ordinary person that resistance would be met by force." Further stating that notwithstanding the

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United States Supreme Court's decision in (*Ct., Carter v. United States, supra*) requiring proof of general "intent" in bank robbery prosecutions does not exist.

The Court of Appeals in an unpublished *per curiam* opinion concluded that there is ample evidence that the Petitioner knew his actions were objectively intimidating. His actions appeared to be calculated to intimidate the teller without causing her to panic. At best, Petitioner's assertion that some evidence supported his defense could create uncertainty over whether the verdict rested on the instructions, but does not show that any erroneous jury instructions resulted in his conviction. App. A.

The Court of Appeals citing *United States v. Ali*, 991 F.3d 561, 575 (4th Cir. 2021), held that to establish prejudice, "[the defendant] must show that the erroneous instruction given resulted in his conviction." Until this Court's opinion in this case at hand, the *Ali* burden—requiring the defendant to show that the erroneous instruction resulted in his conviction—has never been applied in this Circuit to plain error review of a district court's failure to instruct on an essential element of a

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CRIMINAL OFFENSE. THE ALI BURDEN IT SEEMS IS PRIMARILY USED WHERE THE DISTRICT COURT PROVIDES THE JURY WITH ALTERNATIVE BASES FOR CONVICTION, ONE OF WHICH IS PROPER, AND ONE OF WHICH IS IMPROPER. IN THAT SITUATION, THE DEFENDANT MUST SHOW THAT THE JURY BASED ITS VERDICT ON THE "IMPROPER" BASIS. SEE, E.G., UNITED STATES V. ALI, SUPRA, UNITED STATES V. HASTINGS, 134 F.3D 235 (4TH CIR. 1998) AND UNITED STATES V. ROBINSON, 627 F.3D 941 (4TH CIR. 2010).
APP. A

IN THIS CASE THIS PETITIONER ASSERTS THERE WASN'T ALTERNATIVE INSTRUCTIONS. THE DISTRICT COURT INSTRUCTED THE JURY ON THE MEANING OF "INTIMIDATION" MINUS THE ESSENTIAL MENS REA ELEMENT WITH RESPECT TO THE LAW OF BANK ROBBERY UNDER 18 U.S.C. § 2113(A). IN THIS CIRCUIT, WHERE A DISTRICT COURT PLAINLY ERRS BY "FAILING" TO INSTRUCT ON AN ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE, A DEFENDANT'S BURDEN UNDER OLANO'S THIRD PRONG OF PLAIN ERROR REVIEW IS: WHEN, AS HERE, A DISTRICT COURT ERRONEOUSLY OMITTS AN ELEMENT OF AN OFFENSE FROM JURY INSTRUCTIONS, WE REVERSE ONLY IF AN ERROR RESULTS IN HARM TO THE DEFENDANT. (CITATION OMITTED). AN ERROR IS HARMLESS WHEN IT

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appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."
(emphasis supplied)(citation omitted)

United States v. Collins, 982 F.3d 236, 243 (4th Cir. 2020). As here, Collins involved plain error review of a district court's failure to instruct the jury on an essential element of a criminal offense. In support of its holding, the panel in Collins cited United States v. Medley, 972 F.3d 399 (4th Cir. 2020), *reh'g en banc granted*, 828 Fed. Appx. 923 (4th Cir. 2020) (C.S. GREGORY, J. King concurring, J. Quattlebaum dissenting). Collins, 982 F.3d at 243. Medley, Collins, and this appeal all involve plain error review of a district court's failure to instruct the jury on an essential element of a criminal offense. In United States v. Hardy, 999 F.3d 250 (4th Cir. 2021) (plain error review of the district court's failure to give an instruction on the weight to be afforded to a defendant's confession) the Court determined that the defendant had not carried his burden because (1) other instructions limited the prejudice of the failure to give the omitted instruction; and (2) there was little to no evidence from which the jury could have found the defendant's confession

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to be involuntary.

By contrast, here in this case once again there were no other instructions that limited the prejudice from the omitted instruction, and there was plenary evidence from which a properly instructed jury, (cf., *Elonis v. United States*, *supra*) could find that the Petitioner did not understand his conduct to be intimidating, threatening violent physical force. To my knowledge the Fourth Circuit Court of Appeals has never applied the *Ali* standard where the error at issue is the defendant's "knowledge and intent."

The burden imposed on the Petitioner by the Court's opinion in this case is in conflict it seems with — and much more stringent than — the burden articulated by the full en banc Court in *United States v. Lockhart*, 947 F.3d 187, 192-93 (4th Cir. 2020), and in conflict in my opinion with the burden as articulated by this Court in *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020), *Rehig* en banc granted, 828 Fed. Appx. 923 (4th Cir. 2020).

The prejudice from the instructional error was compounded by the fact that the indictment also failed to allege the essential *MENS REA* element at

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issue. As the Court acknowledged in Medley, that error itself satisfies the third prong of Olano. Medley, 972 F.3d at 410-11. And where, as here, both the indictment and jury instructions failed to include the essential mens rea element of the offense, the cumulative effect of those errors further affects a defendant's substantial rights under Olano's third prong. United States v. Medley, 972 F.3d at 406-411.

This conflict seems to stem from the Carter v. United States, 530 U.S. 255, 268 (2000) Ruling that it seems the circuit in United States v. McNeal, 818 F.3d 141, 155 (4th Cir. 2016) acknowledges but in this case do not acknowledge.

It's in the Petitioner's opinion that the Respondent and the district courts in this Circuit are still operating under a pre Carter law that the government do not have to prove [the accused] knew his/her actions were objectively intimidating, and the Court of Appeals for the Fourth Circuit decision is erroneous and conflicts with this Court's ruling under Carter.

This Petitioner Prays this petition is granted and corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dennis Simon Parker Jr.

Date: January 27, 2022