NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM MULLIGAN,

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

HANNI M. FAKHOURY
Counsel of Record
MOEEL LAH FAKHOURY LLP
2006 Kala Bagai Way, Suite 16
Berkeley, CA 94704
(510) 500-9994
hanni@mlf-llp.com

QUESTIONS PRESENTED FOR REVIEW

1. Does the mere existence of a police policy allowing the impoundment of a car obstructing traffic authorize a prolonged warrantless seizure of a car under the "community caretaking" doctrine of the Fourth Amendment?

2. Does a note to a bank teller in and of itself demonstrate that a bank robbery was committed by "intimidation" under 18 U.S.C. § 2113(a) when neither the note nor any action taken by the suspect demonstrated an intent to use violent physical force?

INTERESTED PARTIES

Petitioner is William Mulligan, an inmate at the Federal Correctional Institution in Ray Brook, New York. Mr. Mulligan was the defendant in the district court and the appellant below. Respondent is the United States.

RULE 14.1(b)(iii) STATEMENT

There are no proceedings directly related to the case in this Court.

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INTRODUCTION

William Mulligan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his conviction after jury trial of four counts of bank robbery.

OPINIONS BELOW

The Ninth Circuit's unpublished memorandum affirming Mr. Mulligan's conviction is unreported but available at 2024 WL 4144084 (9th Cir. 2024) and included in the Appendix at 1a. Its January 7, 2025 order denying Mr. Mulligan's petition for panel rehearing and rehearing en banc is unreported and included in the Appendix at 5a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on September 11, 2024, denied the petition for panel rehearing and rehearing en banc on January 7, 2025, and issued its mandate on January 15, 2025. This petition is timely. Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 U.S.C. § 2113(a) states:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing

> of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
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> Shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

I. Mr. Mulligan's arrest and the warrantless seizure of his car.

On January 28, 2021, Novato, California Police Department ("NPD") Officer Jerob Lomax was patrolling when his "attention was drawn to a white Nissan four door vehicle" that "did not have any license plates attached," in violation of California law. Lomax stopped the car and spoke with its driver, William Mulligan.[1] Mr. Mulligan explained that although the car had no license plates, there was a temporary tag on the rear driver's side window.

Lomax returned to his patrol car to check Mr. Mulligan's license and registration. The dispatcher reported there were two *Ramey* warrants for Mr. Mulligan's arrest for several bank robberies in Alameda and Contra Costa counties

[1] Mr. Mulligan transmitted a copy of digital recordings relevant to this appeal, including body worn camera ("BWC") video footage taken by Lomax of the arrest that were exhibits to both motions to suppress.

in California.[2] Lomax directed Mr. Mulligan to exit the car, patted him down, spent the next 20 minutes conducting field sobriety tests, and concluded Mr. Mulligan was not impaired.

Lomax then arrested Mr. Mulligan for the two outstanding *Ramey* warrants. Lomax conducted a search of Mr. Mulligan incident to arrest, finding a bullet in Mr. Mulligan's front left pocket. After being read his *Miranda* rights, Mr. Mulligan invoked by saying "I want my lawyer." Lomax asked Mr. Mulligan if he was going to find a gun in the car, a question Mr. Mulligan did not answer. Mr. Mulligan was placed in a patrol car.

Lomax looked through the items taken from Mr. Mulligan. He pulled out a wallet, removed the money and found a handwritten note stating, "this is a robbery give me the 100 50 quickly." The officer assisting Lomax told him "there's gotta be a firearm in there," referring to the car. As other officers arrived, Lomax asked "can I even search it" to which he was told "no." Lomax continued "I kind of want to know if there's a weapon in there" and another officer explained "we can do just a quick cursory" search. The officers found a revolver in the trunk.

Lomax took Mr. Mulligan to the Marin County, California jail where he was booked on the *Ramey* warrants and for firearm offenses. Marijuana, four rounds of ammunition, a switchblade knife, the handwritten note in the wallet, and approximately $113 in cash were "booked into NPD evidence." The car "was towed for

[2] A *Ramey* warrant authorizes California law enforcement to arrest someone before a criminal case has been filed by, and without the involvement of, the District Attorney. *See* Cal. Pen. Code § 817; *People v. Ramey*, 16 Cal. 3d 263 (1976).

evidence…to a secure vehicle evidence location in Novato." An email from the lead Contra Costa investigator sent shortly after Mr. Mulligan's arrest on January 28 noted he had "asked Novato to tow his car for evidence."

The next morning, NPD was "instructed to respond to Marin County Jail and retrieve Mulligan's property." An officer seized several items from a "clear plastic bag," including keys, clothes, and a gaiter type face mask, which he boked "into NPD evidence." On February 3, 2021, another NPD officer who was "handling the property release to the FBI as the investigation was picked up by federal prosecutors" released all property seized by NPD to the FBI. The next day, the FBI transported the property to its office in Oakland, California. Neither NPD nor the FBI had a warrant to seize the car or any of Mr. Mulligan's property.

On February 16, 2021, a federal criminal complaint was filed charging Mr. Mulligan with unarmed bank robbery under 18 U.S.C. § 2113(a). Mr. Mulligan made his initial appearance in federal court on February 18, 2021 after Marin County dismissed its charges. On March 18, 2021, two months after Mr. Mulligan's arrest and a month after his initial appearance in federal court, FBI Special Agent Megan Jakub obtained a federal warrant authorizing a search of Mr. Mulligan's seized car.

II. The district court denies two motions to suppress.

On May 13, 2021, a grand jury returned an indictment charging Mr. Mulligan with five counts of unarmed bank robbery. Before trial, Mr. Mulligan filed two motions to suppress. The first motion to suppress argued the *Ramey* warrants were unsupported by probable cause and NPD's warrantless searches of his wallet and car

violated the Fourth Amendment. After an evidentiary hearing, the district court denied the motion.

The second motion to suppress argued NPD's warrantless seizure, and prolonged retention, of his car was unjustified under the Fourth Amendment. The district court denied the motion in a written order. It held "there is little doubt of a valid caretaking purpose" and that "safety was a primary purpose from the very start." It found "the video footage from the arrest undeniably shows that the vehicle was parked within a slight bend in such a way that it was protruding into the road." It believed NPD's vehicle towing policy "recognizes the limit of the community caretaking doctrine" and "enumerates instances when the vehicle should not be towed, which further cabins the officer's discretion."

III. The district court overrules Mr. Mulligan's objection to the jury instruction defining "intimidation."

Before trial, the parties filed competing proposed jury instructions, particularly as the Ninth Circuit's model instruction defining bank robbery did not define the statutory term "force, violence or intimidation" in 18 U.S.C. § 2113(a).

At the pretrial conference, Mr. Mulligan explained "This is an intimidation case. There's no force, there's no violence. The government, in their trial memo, already indicated their case is going to rise and fall on intimidation." The government proposed the following instruction:

> To take, or attempt to take, by intimidation means willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm. Express threats of bodily harm, threatening body motions, or the physical possibility of a concealed weapon are not required to establish intimidation.

Mr. Mulligan objected to the second sentence of the government's proposed instruction—reading "Express threats of bodily harm, threatening body motions, or the physical possibility of a concealed weapon are not required to establish intimidation"—explaining it was "an illustration, so it's not a definition of the relevant word," and thus argumentative.

The district court overruled the objection, explaining "the second sentence further defines what intimidation means" and "will give the jury the tools that it needs to have in order to resolve any factual issues in this case. The fact that it indicates that a negative, or an express threat is not required is useful in terms of deciding whether or not intimidation exists, and the first sentence does not talk about express versus implied acts."

On March 2, 2023, the jury returned a guilty verdict on all counts.

IV. The Ninth Circuit affirms.

On appeal, Mr. Mulligan challenged the denial of the suppression motions and the jury instruction defining the term "intimidation." The Ninth Circuit affirmed in an unpublished memorandum on September 11, 2024.

It held "the community caretaking doctrine permitted the warrantless seizure of Mulligan's car because the decision to tow the car comported with standardized police procedures and was done to promote the flow of traffic." Appx. 2a. It also found "the two-month retention of the car was not improper because Mulligan never objected while in custody to the retention of the car, nor did he ask police to return it to his home or request to have someone pick it up." *Id.*

The Ninth Circuit also found no error with the jury instruction, explaining it "accurately stated the law that express threats of bodily harm, threatening body motions, or the physical possibility of a concealed weapon are not required to establish intimidation," and believed the "instruction did not intrude on jury deliberations because, rather than indicating that any particular facts were determinative, the district court's instructions informed the jury of what facts were *not* necessary to establish intimidation." Appx. 3a-4a (emphasis in original). Finally, the Ninth Circuit believed any error was harmless beyond a reasonable doubt. Appx. 4a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit, like the district court below it, misinterpreted this Court's caselaw on warrantless seizures and the meaning of "violent physical force" to affirm Mr. Mulligan's convictions.

First, the Ninth Circuit incorrectly held that the existence of a police policy authorizing the impoundment of a car was enough, in and of itself, to justify a warrantless seizure of a car under the Fourth Amendment's community caretaking doctrine. But that contradicts this Court's clear instruction that any warrantless seizure of a car must be conducted under criteria that sets forth the parameters of when and how police can impound a car. The Ninth Circuit further erred when it found that a warrantless seizure of car impeding traffic could be extended for months when the only justification for the warrantless seizure—the flow of traffic—was long abated. Because the Ninth Circuit dramatically expanded what is supposed to be a

narrow exception to the Fourth Amendment's warrant requirement, a writ of certiorari should issue.

Second, the Ninth Circuit found no error when the jury was given an instruction suggesting the term "intimidation" in 18 U.S.C. § 2113(a) did not require the threat to use "violent physical force." The Ninth Circuit reached that conclusion by relying on prior precedent that has been significantly undermined by later decisions of this Court making clear that "violent physical force" means "force capable of causing physical pain or injury."

This Court should grant a petition for a writ of certiorari.

I. The Ninth Circuit erred in finding the mere existence of an impoundment policy makes a prolonged warrantless seizure of a car reasonable under the Fourth Amendment's "community caretaking."

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "[S]eizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (quotations and citations omitted). A *Ramey* warrant merely authorizes the arrest of a suspect, and the state arrest warrants here did not authorize a search or seizure of Mr. Mulligan's property. To seize the car, NPD needed either a warrant or to satisfy an exception to the warrant requirement. It had neither and the evidence seized from the car should have been suppressed.

The Ninth Circuit, however, found that the "the community caretaking doctrine permitted the warrantless seizure of Mulligan's car because the decision to tow the car comported with standardized police procedures and was done to promote the flow of traffic." Appx. 2a. But the mere existence of a police policy authorizing the impoundment of a car is not enough, in and of itself, to justify a warrantless seizure of a car under the "community caretaking" doctrine.

Police may "seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). But determining whether such a warrantless seizure satisfies the Fourth Amendment "centers upon the reasonableness of routine administrative caretaking functions." *Id.* at 371, n. 5. This Court has made clear that the Fourth Amendment does not prohibit "the exercise of police discretion" in connection with warrantless administrative searches "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Colorado v. Bertine*, 479 U.S. 367, 375 (1987). That discretion must be "exercised in light of standardized criteria, *related to the feasibility and appropriateness*" of seizing a car. *Id.* at 376 (emphasis added).

The NPD policy here did not circumscribe police discretion because it did not provide any criteria for officers to determine "the feasibility and appropriateness" of seizing the car. *Id.* at 376. The NPD policy was broad and open ended. It permitted immediate towing "if a vehicle presents a hazard" without explaining what circumstances were hazardous. While the policy purported to not require a tow, it

also stated a car driven by an arrestee "shall be stored whenever it is needed for the furtherance of the investigation or prosecution of the case." The policy stated a car should be stored "when the community caretaker doctrine would reasonably suggest that the vehicle should be stored," but did not explain what those circumstances are, instead providing only a limited set of "examples of situations where consideration should be given to leaving a vehicle at the scene in lieu of storing." Without "standardized criteria, related to the feasibility and appropriateness" of seizing the car, the warrantless seizure of the car violated the Fourth Amendment. *Id.* at 376.

Even if the car was properly towed under the community caretaking exception, "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on "unreasonable seizures." *Jacobsen*, 466 U.S. at 124. Once the car was towed, NPD had no legal basis to continue seizing it under its community caretaking functions. Yet officers held the car, and made no inquiry to determine whether someone else could take the car, because detectives wanted the car as "evidence" in their criminal investigation.

But warrantless police seizures of a car in connection with law enforcement "community caretaking functions" are only justified under the Fourth Amendment when unrelated to an ongoing criminal investigation. *See Opperman*, 428 U.S. at 370 n. 5. Again, a warrantless seizure of property under the "community caretaking" doctrine must occur "according to standard criteria and on the basis of *something other than suspicion of evidence of criminal activity*." *Bertine*, 479 U.S. at 375

(emphasis added). Here, where impounding the car was in furtherance of an ongoing criminal investigation, as the law enforcement personnel in this case candidly admitted, the community caretaking exception no longer applied. NPD needed a warrant to continue seizing the car; yet it never obtained one. The Ninth Circuit was wrong to find that the initial seizure of the car, which "was done to promote the flow of traffic," nonetheless permitted the police to seize the car in a tow yard for an additional two months without a warrant, enabling the FBI to later search the car and seize evidence from it. Appx. 2a.

The Ninth Circuit found the two month delay did not rise to a constitutional error "because Mulligan never objected while in custody to the retention of the car, nor did he ask police to return it to his home or request to have someone pick it up." Appx. 2a. But that was insufficient to justify a prolonged seizure of property under the "community caretaking" doctrine, which in no way is dependent on a person's seeming acquiescence to the seizure of his property.

Independent of the "community caretaking" doctrine, the prolonged, warrantless seizure of property is unreasonable in and of itself under the Fourth Amendment. *United States v. Van Leeuwen*, 397 U.S. 249, 252 (1970). Police are obligated under the Constitution to "diligently obtain[] a warrant in a reasonable period of time." *Illinois v. McArthur*, 531 U.S. 326, 334 (2001). The Fourth Amendment "is designed to prevent, not simply to redress, unlawful police action." *Steagald v. United States*, 451 U.S. 204, 215 (1981) (quotations omitted). The "brevity of the invasion of the individual's Fourth Amendment interests is an important factor

in determining whether the seizure" is reasonable. *United States v. Place*, 462 U.S. 696, 709 (1983).

It is clear that two months is not a brief seizure. In the absence of any explanation as to why the FBI waited weeks to obtain a warrant for the car, the unexplained delay was unreasonable even if Mr. Mulligan was in custody. The fruit of that unconstitutional seizure—evidence collected by the FBI—should have been suppressed. The Ninth Circuit's decision to the contrary should be reviewed by this Court.

II. The jury instruction defining "intimidation" in 18 U.S.C. § 2113(a) conflicted with this Court's decisions defining "violent physical force."

The federal bank robbery statute criminalizes, in part, "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." 18 U.S.C. § 2113(a) (emphasis added).

Over Mr. Mulligan's objection, the district court provided the following definition of "intimidation" to the jury:

> With respect to all counts, to take, or attempt to take, by intimidation means willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm. Express threats of bodily harm, threatening body motions, or the physical possibility of a concealed weapon are not required to establish intimidation.

Mr. Mulligan argued to both the district court and the Ninth Circuit that this instruction misstated the law by suggesting "intimidation" did not require the threat to use "violent physical force."

Yet the Ninth Circuit found no error, believing the "instruction accurately stated the law that express threats of bodily harm, threatening body motions, or the physical possibility of a concealed weapon are not required to establish intimidation." Appx. at 3. It reached that resulted by relying on its prior decision in *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983), despite the fact that decision is no longer good law following intervening decisions by this Court.

In *Hopkins*, the defendant presented a note stating "Give me all your hundreds, fifties and twenties. This is a robbery." 703 F.3d at 1103. When the teller responded she had no hundreds or fifties, the defendant said "okay, then give me what you've got," but left the bank in a "nonchalant manner" before he got any money. *Id.* "Hopkins spoke calmly, made no threats, and was clearly unarmed." *Id.* Convicted at trial, the defendant appealed arguing there was insufficient evidence of "intimidation" to support a conviction under § 2113(a). The Ninth Circuit disagreed, affirming the conviction and finding "express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapons" were not required for a § 2113(a) conviction, and "the threats *implicit* in Hopkins' written and verbal demands for money" were "sufficient evidence of intimidation." *Id.* (emphasis added).

Hopkins is clearly no longer good law following intervening decisions by this Court. In *Johnson v. United States*, 576 U.S. 591 (2015) ("*Johnson* II"), the Court

found the Armed Career Criminal Act's ("ACCA") "residual clause" was unconstitutionally vague. *Johnson* II, 576 U.S. at 594, 606 (citing 18 U.S.C. § 924(e)(2)(B)(ii)). After *Johnson* II, a conviction can only qualify as a "crime of violence" under the ACCA if it satisfied the "force clause," meaning it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). "[V]iolent physical force" under this standard means "force capable of causing physical pain or injury." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson* I).

Applying these concepts to § 2113(a), the Ninth Circuit—along with many other Circuit courts—have ruled after *Johnson* I and II that bank robbery in "its least violent form"—meaning by "intimidation"—"requires at least an implicit threat to use the type of violent physical force necessary to meet the…standard" to qualify as a "crime of violence." *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) (quotations omitted) (citing cases). These courts reached that result by invoking this Court's "categorical" analysis, which looks only at a crime's elements. *See Mathis v. United States*, 579 U.S. 500, 504 (2016). As a result, this analysis of the kind of force necessary to satisfy the "intimidation" requirement of § 2113(a) applied in formulating the jury instructions defining the elements the jury was required to find beyond a reasonable doubt in order to convict Mr. Mulligan.

And equally, the Ninth Circuit's prior holding in *Hopkins*, a decision predating both *Johnson* I and II, that a note presented to a bank teller demanding money in and of itself—without any other fact from the suspect's demeanor or the content of

the note implying an intention to violently and physically harm anyone—nonetheless contains an "implicit" threat to use "violent physical force" that is "capable of causing physical pain or injury" is incorrect. *Johnson* I, 559 U.S. at 140.

Here, the instructions given to the jury did not explain that "intimidation" required a threat to use "violent physical force." The instruction focused specifically on actions that would be indicative of violent physical force but explained none were necessary for the jury to find "intimidation." Because that is not the law, the instruction was erroneous and the Ninth Circuit was wrong to find otherwise.

An error is not harmless when "the record contains evidence that could rationally lead to a contrary finding with respect to the" element challenged in a jury instruction. *Neder v. United States*, 527 U.S. 1, 19 (1999). Here, "intimidation" was the only contested element at trial and the erroneous instruction responded directly to Mr. Mulligan's defense, which was that neither the suspect's demeanor nor the content of the note were "intimidating."

Because the four bank tellers reacted in completely different ways to the same note presented by the same person in the same manner—with one teller testifying she was not scared and two tellers refusing to hand over money—it is clear there was insufficient evidence that the circumstances were objectively "intimidating."

This Court should thus review the Ninth Circuit's decision affirming the convictions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 3, 2025

HANNI M. FAKHOURY
Counsel of Record
MOEEL LAH FAKHOURY LLP
2006 Kala Bagai Way, Suite 16
Berkeley, CA 94704
(510) 500-9994
hanni@mlf-llp.com