No. 97-7213

In the Supreme Court of the United States

OCTOBER TERM, 1997

SYLVESTER MOSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether bank larceny, 18 U.S.C. 2113(b), is a lesser included offense of bank robbery, 18 U.S.C. 2113(a).

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OPINION BELOW

The opinion of the court of appeals (J.A. 39-53) is reported at 126 F.3d 200.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1997. A petition for rehearing was denied on December 15, 1997 (Pet. App. 1). The petition for a writ of certiorari was filed on December 22, 1997, and was granted, limited to the first question presented, on March 23, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

Section 2113 of Title 18 and Rule 31(c) of the Federal Rules of Criminal Procedure are set forth in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on two counts of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to concurrent terms of 210 months' imprisonment. J.A. 24-26, 31-33. The court of appeals affirmed. J.A. 52-53.

1. On November 9, 1995, petitioner entered the First Fidelity Bank at 1008 Madison Avenue, in Paterson, New Jersey, approached a teller, and displayed a sign reading "HOLD UP." The teller became very scared and nervous. After petitioner placed his hands on the counter, petitioner said, in a demanding tone, "Can I have all your money?" The teller gave petitioner some "bait money." Petitioner threw that money back at her. Feeling frightened, the teller gave him more money. Petitioner then left the bank. The teller reported the robbery to a supervisor. J.A. 43; C.A. App. 158-162.

On November 20, 1995, petitioner entered the First Fidelity Bank on Fifth Avenue in Paterson, approached a teller, told her, "This is a hold up," and asked for big bills first. Petitioner gestured towards his coat as if he had a weapon. The teller became so upset that she lost bladder control. She threw some money on the counter and then immediately walked towards the bathroom. The teller was "hysterical" and told another bank employee that she had just been robbed. J.A. 41-42; C.A. App. 131-134.

That same day, FBI Special Agent John Conway arrested petitioner. During an interview, petitioner admitted that he and an accomplice had just robbed a bank. Conway seized some of the bank's money from petitioner's socks. J.A. 42; C.A. App. 179-183.

2. Petitioner was charged with two counts of bank robbery, in violation of 18 U.S.C. 2113(a). Petitioner's defense at trial was that he committed only bank larceny, rather than bank robbery, because he did not use force, violence, or intimidation to obtain funds from the banks. On cross-examination, Agent Conway agreed that he could not see force or violence on the November 20 surveillance tape, which showed petitioner robbing the second bank. J.A. 42. Agent Conway also stated that he could not "pinpoint" intimidation on the tape, but emphasized that the tape was "not a true depiction" of the events in the bank, in part because it lacked audio. C.A. App. 198-199, 212. Agent Conway did, however, testify that a still photograph from the November 20 tape showed petitioner with his right arm inside his jacket, which was consistent with the teller's testimony that petitioner had made a gesture to his coat as if he had a gun. *Id.* at 213-214.

The Reverend Louis McDowell testified that he was standing behind petitioner during the November 20 robbery and that he did not hear petitioner say anything to the teller, make any motions, or do anything that could be characterized as force or violence. McDowell admitted that the teller was nervous when she gave petitioner the money. J.A. 42; C.A. App. 265-266, 268.

At the close of evidence, petitioner asked that the jury be instructed that it could return a verdict finding petitioner guilty of bank larceny, in violation of 18

U.S.C. 2113(b) (Supp. II 1996). J.A. 4-6. The district court denied the motion, ruling that the evidence did not warrant such an instruction. J.A. 14. The court stated that no reasonable juror would have concluded that the tellers had given petitioner money voluntarily rather than as a result of intimidation. J.A. 14-15.

3. The court of appeals affirmed. J.A. 39-53. On appeal, petitioner challenged the failure to give a bank larceny instruction, contending that bank larceny is a lesser included offense of bank robbery. Under Rule 31(c) of the Federal Rules of Criminal Procedure, he argued, he was entitled to an instruction on the lesser included offense. The court of appeals disagreed, holding that bank larceny is not a lesser included offense of bank robbery.

The court of appeals explained that, in *Schmuck* v. *United States*, 489 U.S. 705 (1989), this Court had held that the determination of whether one offense is a "lesser included" or "necessarily included" offense of another depends on the elements of the offenses. Where the lesser offense requires proof of an element not required for the greater offense, it is not a lesser or necessarily included offense, and no instruction is required under Federal Rule of Criminal Procedure 31(c). J.A. 39-40, 45.[1]

Applying *Schmuck*, the court noted that bank robbery does not expressly have an "intent to steal or purloin" element, but that bank larceny does. Nor is an "intent to steal or purloin" element implied in bank

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[1] Petitioner also argued that the district court erred in admitting evidence of his prior bank robbery conviction under Rules 403 and 404 of the Federal Rules of Evidence. The court of appeals summarily rejected that contention. J.A. 40 n.1.

robbery. The court emphasized that, under circuit precedent, the subjective intent of a bank robber to steal is irrelevant; it is sufficient if he resorts to force, violence, or intimidation to achieve his purposes. J.A. 45-51. The court recognized that robbery and larceny were greater and lesser offenses at common law, but it found no indication in the history and evolution of Section 2113 that Congress intended to codify that common law rule, especially since the bank robbery and bank larceny provisions were adopted at different times. J.A. 47-51. The court of appeals noted that cases from other circuits had language suggesting that bank larceny is a lesser included offense, but ultimately concluded that those cases "are not consistent with the methodology of *Schmuck*." J.A. 51-52.

SUMMARY OF ARGUMENT

I. Bank larceny is not a lesser included offense of bank robbery.

A. Under *Schmuck* v. *United States*, 489 U.S. 705 (1989), the resolution of the lesser included offense issue turns on whether all of the statutory elements of the putative lesser offense are necessarily established by proving the charged offense. Bank larceny contains elements not found in bank robbery. Section 2113(b) bank larceny requires the government to prove that the defendant (1) had the specific "intent to steal or purloin" the bank's property; (2) "carrie[d] away" that property; and (3) took property that had a monetary value. 18 U.S.C. 2113(b) (Supp. II 1996). Section 2113(a) bank robbery contains none of those requirements. 18 U.S.C. 2113(a).

The omission of a specific intent requirement in the first paragraph of Section 2113(a) is significant.

Congress provided specific intent elements in other subsections of Section 2113. For example, the bank burglary offense set forth in the second paragraph of Section 2113(a) requires an "intent to commit in such bank * * * any felony affecting such bank." The presumption is that the omission of a counterpart specific intent element for bank robbery was deliberate. See *Bates* v. *United States*, 118 S. Ct. 285, 290 (1997). That conclusion is further supported by the absence of a specific intent to steal requirement in other robbery offenses defined in the criminal code, such as 18 U.S.C. 1951 (Hobbs Act), 18 U.S.C. 2111 (robbery in the special maritime and territorial jurisdiction of the United States), 18 U.S.C. 2118(a) (robbery of controlled substances), and 18 U.S.C. 2119 (Supp. II 1996) (carjacking).

Although Section 2113(a) bank robbery does not contain an express mental element, it is appropriate to infer a general intent requirement. The courts of appeals have consistently held that the defendant must act "knowingly" with respect to each *actus reus* in Section 2113(a). The conclusion that the knowing use of "force and violence, or by intimidation" is a sufficient mental element accords with the purposes behind Congress's enactment of the bank robbery offense. Because of the threat posed to innocent persons in financial institutions, bank robbery causes as much social harm and is just as serious even if the perpetrator lacks a specific intent to deprive the bank permanently of its property.

For similar reasons, the omission of an asportation element and a monetary valuation requirement in Section 2113(a) bank robbery further supports the conclusion that Congress did not intend for bank

larceny in Section 2113(b) to be a lesser included offense of bank robbery.

B. The legislative history does not support petitioner's submission. Although simple larceny was a lesser included offense of robbery at common law, an examination of the language and background of Section 2113 refutes the contention that Congress intended merely to codify the common law robbery and larceny offenses. Congress did not initially enact a bank larceny offense when it proscribed bank robbery in 1934. When it later added a crime for bank larceny, it did so to fill a gap in the statute—the failure to reach the theft of bank property without the use of force, violence, or intimidation. Congress did not indicate in 1937 that it intended bank larceny to be a lesser included offense of the bank robbery crime established in 1934. And as this Court has already recognized, the language of Section 2113 creates a larceny offense that is broader than the common law. See *Bell* v. *United States*, 462 U.S. 356, 360-361 (1983). The same is true of the robbery offense defined in Section 2113.

C. Nor do this Court's cases and canons of statutory construction support petitioner's contention. In *Prince* v. *United States*, 352 U.S. 322 (1957), this Court held that convictions under paragraphs one and two of Section 2113(a) merge if the defendant actually completed the crime of bank robbery. That holding did not entail an analysis of the statutory elements of the offenses contained in Section 2113(a) and (b), as is now required by *Schmuck*, *supra*. The holding in *Prince* may bar certain cumulative punishments under Section 2113 (a result achieved today by the Sentencing Guidelines), but it does not compel the giving of a lesser included offense instruction when

the government charges only bank robbery (and not bank larceny) in the indictment.

Similarly, petitioner's reliance on *Morissette* v. *United States*, 342 U.S. 246 (1952), is misplaced. *Morissette* involved a different larceny statute, in which the Court reasoned that the theft offenses at issue in that case incorporated common law requirements. That conclusion is inconsistent with this Court's interpretation of Section 2113. Finally, because Section 2113 is not ambiguous about the elements of bank larceny and bank robbery, the rule of lenity does not apply in this case.

II. Even if, contrary to our submission, this Court were to hold that the statutory elements of Section 2113(b) create a lesser included offense of Section 2113(a) bank robbery, the district court correctly declined to give a lesser included offense instruction in this case. Federal Rule of Criminal Procedure 31(c) requires such an instruction only if the evidence would permit a rational jury to convict the defendant of the lesser offense while acquitting him of the greater one. The district court here properly concluded that the evidence admitted of only one conclusion: that petitioner obtained the bank's money by the use of intimidation against the tellers. There is no evidence that petitioner obtained the funds from the tellers' voluntary actions. Because no rational juror could reach the conclusion advanced by petitioner, a bank larceny instruction was not required.

ARGUMENT

I. BANK LARCENY IS NOT A LESSER INCLUDED OFFENSE OF BANK ROBBERY

Federal Rule of Criminal Procedure 31(c) provides that a "defendant may be found guilty of an offense

necessarily included in the offense charged." In *Schmuck* v. *United States*, 489 U.S. 705 (1989), the Court held that, for purposes of instructing the jury, the test for determining whether one offense is a "necessarily included" offense of another under Rule 31(c) is the statutory "elements" test. Under that test:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716. See *Hopkins* v. *Reeves*, No. 96-1693 (June 8, 1998), slip op. 7 & n.6.

A. BANK LARCENY CONTAINS STATUTORY ELEMENTS THAT BANK ROBBERY DOES NOT HAVE

Because Congress is solely responsible for defining federal crimes, see *Staples* v. *United States*, 511 U.S. 600, 604-605 (1994), this Court will "ordinarily resist reading words or elements into a statute that do not appear on its face," *Bates* v. *United States*, 118 S. Ct. 285, 290 (1997) (specific intent to defraud is not an element of the offense of misapplication of funds, 20 U.S.C. 1097(a)); *United States* v. *Wells*, 117 S. Ct. 921 (1997) (materiality is not an element of the offense of making a false statement to a federal bank, 18 U.S.C. 1014). That principle is especially apt here because bank robbery and bank larceny are defined in a single provision, thus highlighting the significance of Congress's choice of contrasting terminology. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same

Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates*, 118 S. Ct. at 290 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Section 2113 of Title 18 punishes crimes against banks in five subsections, the first two of which are bank robbery (18 U.S.C. 2113(a)) and bank larceny (18 U.S.C. 2113(b)).[2] Bank larceny is not a lesser included offense of bank robbery because Section 2113(b) contains elements not present in Section 2113(a). Nothing in either subsection expresses an intent by Congress to create greater and lesser included offenses between the first paragraph of subsection (a) and subsection (b), as Congress explicitly did in subsections (d) (18 U.S.C. 2113(d)) and (e) (18 U.S.C.

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[2] Section 2113 punishes diverse crimes against banks. Section 2113(a) provides, in separate paragraphs, that bank robbery and entry into a bank with the intent to commit a felony therein are crimes punishable by up to 20 years' imprisonment. Section 2113(b) provides that bank larceny of property exceeding $1000 is a crime punishable by up to ten years' imprisonment. In a separate paragraph, Section 2113(b) states that bank larceny of property not exceeding $1000 is a crime punishable by a fine of up to $1000 and/or imprisonment not to exceed one year.

Section 2113(c) makes receipt of stolen bank property a crime and provides for the punishment set forth in Section 2113(b). 18 U.S.C. 2113(c). Section 2113(d) states that aggravated assault during a bank robbery or bank larceny is a crime and provides for up to 25 years' imprisonment. 18 U.S.C. 2113(d). Section 2113(e) provides that a homicide or kidnapping committed during the commission of a crime against a bank defined in this section is subject to a minimum of ten years' imprisonment for the kidnapping and life imprisonment for the homicide. 18 U.S.C. 2113(e).

2113(e)) for other offenses established in Section 2113.[3]

Section 2113(a) provides, in its first paragraph, that, "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, * * * 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," is guilty of an offense that is punishable by up to twenty years in prison. 18 U.S.C. 2113(a). Section 2113(b), by contrast, provides that anyone who "takes *and carries away*, *with intent to steal or purloin*, any property or money or any other thing of value *exceeding $1,000* belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association," is guilty of an offense punishable by up to ten years in prison. 18 U.S.C. 2113(b) (Supp. II 1996) (emphasis added). Section 2113(b) thus requires proof, as the italicized terms indicate, of three elements not present in Section 2113(a): (1) a specific intent to steal or purloin; (2) a requirement that the

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[3] Section 2113(d), for example, is a greater offense of those created in subsections (a) and (b), because it provides that "[w]hoever, 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 * * * imprisoned not more than twenty-five years." 18 U.S.C. 2113(d).

Similarly, Section 2113(e) expresses an unequivocal intent to create a greater-included offense by providing that, "[w]hoever, in committing any offense defined in this section, * * * kills any person, * * * shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment." 18 U.S.C. 2113(e).

property be "carr[ied] away"; and (3) a provision that the property taken have a monetary value.

1. *Bank larceny, unlike bank robbery, requires proof of a specific intent to steal*

a. While bank larceny contains an express "intent to steal or purloin" element, bank robbery has no such mental element in its text. The omission of that phrase is significant. Although the phrases "general intent" and "specific intent" have "been the sources of a good deal of confusion," *United States* v. *Bailey*, 444 U.S. 394, 403 (1980), "[t]he distinction between 'general intent' and 'specific intent' is not without importance in the criminal law," 1 W. LaFave & A. Scott, *Substantive Criminal Law* 315 (1986 & Supp. 1998).

> [T]he most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but *in addition* it must be shown that there was an "intent to steal" the property.

1 W. LaFave & A. Scott, *supra*, at 315 (emphasis added). By including a specific intent requirement in Section 2113(b) but not in the first paragraph of Section 2113(a), Congress intended that a prosecution for bank larceny establish a "special mental element * * * above and beyond" the general mental state required for the *actus reus* of the crime. Congress's omission of the specific "intent to steal" from the

first paragraph of Section 2113(a) also contrasts with its provision of a different specific intent element—the "intent to commit in such bank * * * any felony affecting such bank" in the second paragraph of Section 2113(a).[4] That aspect of Section 2113(a) strongly suggests that if Congress had intended to require proof of an "intent to steal" to establish bank robbery, it would have said so expressly. Indeed, one court of appeals has concluded that the omission of a specific intent element in the first paragraph of Section 2113(a) and the inclusion of specific intent elements in the second paragraph of Section 2113(a) and in Section 2113(b) "shows careful draftsmanship." *United States* v. *DeLeo*, 422 F.2d 487, 490 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).

b. The omission of a specific intent requirement in the bank robbery offense in Section 2113(a) is consistent with robbery offenses defined elsewhere in

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[4] The second paragraph of Section 2113(a) is sometimes referred to as the bank burglary offense. The interrelationship between the bank burglary offense, which is not at issue in this case, and Section 2113(b) is not entirely clear. The second paragraph of Section 2113(a) makes it an offense to enter a bank "with intent to commit * * * any larceny." 18 U.S.C. 2113(a). As one commentator has noted:

> [D]espite the fact that section 2113(b) carries a lesser maximum penalty than section 2113(a), it does not seem that section 2113(b) is a lesser included offense of the second paragraph of section 2113(a) * * * . Consequently, when prosecutors are presented with crimes that would seem to be section 2113(b) violations, it appears that they can attempt to prosecute the defendant under the second paragraph of section 2113(a) with no limitations.

3 L. Sand et al., *Modern Federal Jury Instructions* ¶ 53.01, at 53-4 (1997).

the criminal code. Unlike larceny, which federal law has consistently defined to require proof of a specific intent permanently to deprive, robbery has not always been defined that way. In 1946, Congress amended the Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. 1951, to punish certain extortion and robbery offenses. The 1946 amendment defined robbery as the "unlawful taking * * * of personal property, from the person * * * by means of actual or threatened force, or violence, or fear of injury." Act of July 3, 1946, ch. 537, § 1(b), 60 Stat. 420. No specific intent element was provided. That definition was carried over to the present version of 18 U.S.C. 1951 during the 1948 codification. See Act of June 25, 1948, ch. 645, 62 Stat. 683.[5]

The absence of an express intent to steal element is characteristic of other federal robbery statutes, many of which merely define robbery as the forcible taking of the victim's property and omit any reference to a specific mental requirement. For example, Section 2111 criminalizes robbery in the special maritime and territorial jurisdiction of the United States, and does not contain an express specific intent to steal requirement. 18 U.S.C. 2111. The same is true of Section 2118(a), which Congress enacted in 1984 to criminalize robbery of controlled substances. 18 U.S.C.

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[5] Accordingly, courts have held that requests for specific intent instructions in Hobbs Act cases are properly denied, with the requisite intent being knowledge. See, *e.g.*, *United States* v. *Arambasich*, 597 F.2d 609, 614 (7th Cir. 1979) (specific intent instruction not required under Hobbs Act); *United States* v. *Warledo*, 557 F.2d 721, 729 n.3 (10th Cir. 1977) ("Under the clauses of Section 1951, proscribing the obstruction, delay, or attempt to obstruct commerce by robbery or extortion, a general intent to commit those crimes is required.").

2118(a). And Section 2119, which Congress enacted in 1992 to reach carjacking offenses, contains no explicit intent to steal element; rather, it requires proof of an "intent to cause death or serious bodily harm." 18 U.S.C. 2119 (Supp. II 1996).[6] In enacting Section 2119, Congress specifically tracked the language of Sections 2111, 2113, and 2118. See H.R. Rep. No. 851, 102d Cong., 2d Sess. Pt. 1, at 17 (1992). In discussing the "with intent to cause death or serious bodily harm" element of the carjacking statute, Senator Leahy noted in 1997 that "knowingly" is the only mental element required for the usual robbery offense. See 143 Cong. Rec. S1661 (daily ed. Feb. 26, 1997) ("Robbery offenses typically require only what the carjacking statute formerly required by way of scienter, i.e., that property be knowingly taken from the person or presence of another by force and violence or by intimidation.").

Like the omission of a specific intent element in Section 2113(a), the omission of an intent to steal from those other federal robbery statutes cannot be attributed to inadvertence.[7] While common law robbery was generally understood to contain a specific intent to steal element, see pp. 21-23, *infra*, "Congress' silence [in Section 2113(a)] speaks volumes * * * [and] Congress appears to have made the choice

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[6] The proper definition of that intent element is before the Court in *Holloway* v. *United States*, cert. granted, No. 97-7164 (Apr. 27, 1998).

[7] Other—usually older—statutes use the term "rob" or "robbery" without further elaboration. See, *e.g.*, 18 U.S.C. 2112 (robbery of personal property of United States); 18 U.S.C. 2114 (robbery of mail matter); 18 U.S.C. 1661 (robbery ashore). Those statutes, unlike Section 2113(a), retain the common law meaning of robbery. See p. 33, *infra*.

quite deliberately" in omitting any such requirement from Section 2113(a). Cf. *United States* v. *Shabani*, 513 U.S. 10, 14 (1994) (holding that absence of an overt act requirement from 21 U.S.C. 846 was dispositive, notwithstanding that such proof was required for common law conspiracy).

c. Although bank robbery has no specific intent to steal element, that does not mean that it lacks a mental element altogether. The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511 U.S. at 605 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 (1978)). There is a presumption that any federal criminal offense requires a mental element. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one. See *Staples*, *supra* (possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d)); *Bailey*, *supra* (escape, in violation of 18 U.S.C. 751(a)); *United States Gypsum Co.*, *supra* (Sherman Act); *Morissette* v. *United States*, 342 U.S. 246 (1952) (theft, in violation of 18 U.S.C. 641).

In like fashion, the courts of appeals that have ruled that bank robbery is not a specific intent crime have nevertheless construed the statute to contain a "general intent" requirement. See, *e.g.*, *United States* v. *Gonyea*, 140 F.3d 649, 653-654 (6th Cir. 1998); *United States* v. *Fazzini*, 871 F.2d 635, 641 (7th Cir.), cert. denied, 493 U.S. 982 (1989); *United States* v. *Emery*, 682 F.2d 493, 497 (5th Cir.), cert. denied, 459 U.S. 1044 (1982); *United States* v. *Smith*, 638 F.2d 131, 132 (9th Cir. 1981); *United States* v. *Johnston*, 543 F.2d 55, 58 (8th Cir. 1976); *United States* v. *DeLeo*,

supra.[8] Those cases have held that a defendant must be shown to have acted "knowingly" with respect to each *actus reus*, a view that is consistent with the notion that, when a person performs acts proscribed by Congress, criminal liability should be imposed regardless of whether that person desired or merely knew of the practical certainty of the results. See *Bailey*, 444 U.S. at 404; *United States Gypsum Co.*, 438 U.S. at 445; see generally 1 W. LaFave & A. Scott, *supra*, § 3.5.[9]

d. Limiting the mental element of bank robbery to "knowingly" taking by force, violence, or intimidation, instead of an intent to steal, is appropriate in light of the character of that crime. "[T]he gist of [robbery] is a crime against the person." *United States* v. *Mann*, 119 F. Supp. 406, 407 (D.D.C. 1954). Without regard to the robber's intent to steal, the robbery offense warrants sanction because of the fear it instills in the victims and the risk that they will

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[8] Those courts were considering whether diminished capacity is a defense to bank robbery. Because "diminished capacity is a defense only to *specific* intent crimes," evidence of alcohol-induced unconsciousness and other forms of diminished capacity is irrelevant in a Section 2113(a) case because "completed armed bank robbery is a *general* intent crime." *Fazzini*, 871 F.2d at 641; see also *Smith*, 638 F.2d at 132.

[9] In this case, the indictment and the jury instructions establish that the jury found that petitioner committed his robberies with the requisite intent. The indictment alleged that petitioner acted "knowingly and willfully." J.A. 2-3. The jury was instructed that the intimidation element required proof that petitioner acted "knowingly and deliberately." J.A. 19; C.A. App. 355. The jury was charged that the "knowingly" element was to ensure that no person would be convicted of an act done by mistake, accident, or other innocent reason. J.A. 19-22; C.A. App. 355-358.

suffer harm, be it physical or emotional. Bank robberies often occur when employees and customers are in the bank, and robbers often carry and use firearms to gain an advantage over the people inside. After a robbery or attempted robbery, the bank may have to interrupt its business to attend to the needs of the victim, to cooperate with authorities, and to reassure its customers. For those reasons, the bank robbery offense defined in Section 2113(a) punishes the attempt to rob as well as the completed act.

Because the use of force, violence, and intimidation causes social harms regardless of whether the robber has a specific intent to dispossess the bank of its property permanently, it is logical to construe the first paragraph of Section 2113(a) as not requiring a specific intent to steal. The bank robbery statute "describe[s] acts which, when performed, are so unambiguously dangerous to others that the requisite mental element is necessarily implicit in the description." *DeLeo*, 422 F.2d at 491. "It therefore is immaterial for sections 2113(a) and (d) whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit; the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *Ibid.*[10]

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[10] Undoubtedly, most bank robbers will intend to deprive the bank permanently of its property, but that will not invariably be the case. One man robbed a bank solely to be apprehended and returned to prison so he could be treated for his alcohol problem. See *United States* v. *Lewis*, 628 F.2d 1276 (10th Cir. 1980), cert. denied, 450 U.S. 924 (1981). There are likely other kinds of criminals who rob banks primarily to disrupt the bank's business with violence. Terrorists, for example, may well be indifferent to the fate of the bank's prop-

Larceny, on the other hand, is a crime principally committed against property, see R. Perkins & R. Boyce, *Criminal Law* 343-344 (3d ed. 1982), and the specific intent requirement has always been a critical element of that offense: there is no larceny without an intent to deprive the owner permanently of the property taken. 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.5 (1986 & Supp. 1998). The same cannot be said of bank robbery in violation of Section 2113(a). Congress's decision to distinguish the offenses in Section 2113 thus is a reasonable judgment that the two crimes are different in nature and that the bank larceny offense is not simply a lesser degree of bank robbery.

2. *Bank larceny, unlike bank robbery, requires proof that the defendant "carries away" the property*

The Section 2113(a) and (b) offenses also have different *actus reus* requirements. Both offenses use the word "take[]" to describe the *actus reus* of the crime. That word is defined as "[t]o get into one's hands or into one's possession, power, or control by force or stratagem." *Webster's Third New International Dictionary* 2329 (1986); cf. *United States* v. *Moore*, 73 F.3d 666, 668-669 (6th Cir. 1996) (using that definition to define "take" in the carjacking statute, 18 U.S.C. 2119 (Supp. II 1996), and holding that "[a]n intent to permanently deprive is not an element of the federal offenses covering the mere 'taking' from the 'person or presence' of another") (citing 18 U.S.C. 2111, 2113, 2118). Section 2113(b), however, *also* requires that the perpetrator "carries away" the

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erty. Those sorts of robberies nevertheless come within the coverage of Section 2113(a).

property. The term "carry" is defined as "to move while supporting." *Webster's*, *supra*, at 343; see *Muscarello* v. *United States*, No. 96-1654 (June 8, 1998), slip op. 3. The phrase, "carries away" has common law antecedents, and means "[t]he act of removal or asportation, by which the crime of larceny is completed, and which is essential to constitute it." *Black's Law Dictionary* 194 (6th ed. 1986). That asportation element is not present in the Section 2113(a) offense.

This Court has repeatedly noted that "a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990). That is particularly the case with elements of criminal offenses. See *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994). Given that Congress specifically used the phrase "carries away" in Section 2113(b), it should not be lightly read into the text of Section 2113(a). See *Bates* v. *United States*, 118 S. Ct. at 290.

That conclusion is especially important here, where the phrase in question had a distinctive common law connotation. As commentators explain, "[a] movement does not amount to asportation unless it is a *carrying-away* movement." R. Perkins & R. Boyce, *supra*, at 324. "The requirement of asportation may be eliminated entirely by statute, * * * but so long as it is retained, the common-law concept of a carrying-away movement should be required." *Ibid.* See also 2 W. LaFave & A. Scott, *supra*, at 348. Robbery as defined in Section 2113(a) should not be encumbered by common law limitations that Congress expressly elected to retain only for the bank larceny offense.

3. *Bank larceny, unlike bank robbery, requires proof that the property has a monetary value*

A third textual element found in bank larceny but not in bank robbery is the requirement that the prosecution prove that the property taken is reducible to a monetary value. Section 2113(b) permits a sentence of up to ten years' imprisonment if the stolen property exceeds $1000 in value, but only a sentence of up to one year imprisonment if the value is less than that amount. Thus, in a Section 2113(b) prosecution, the jury must be instructed to find that the property taken exceeded the amount necessary to trigger the greater punishment. See *United States* v. *Hoke*, 610 F.2d 678, 679 (9th Cir. 1980). Section 2113(a), on the other hand, contains no such monetary requirement. Rather, it proscribes the forceful taking of "any property or money or any other thing of value belonging to" the financial institution at issue, or the attempt to do so. Section 2113(a) thus criminalizes the forceful taking of property without requiring a jury finding as to the value of the property taken.

B. THE LEGISLATIVE HISTORY OF SECTION 2113 DOES NOT SHOW CONGRESSIONAL INTENT TO MAKE BANK LARCENY A LESSER INCLUDED OFFENSE OF BANK ROBBERY

In arguing that bank larceny should be treated as a lesser offense of bank robbery, despite the textual elements of bank larceny not found in the putatively "greater" offense, petitioner relies (Br. 9-10) on the rule of statutory construction that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law

meaning." *Moskal*, 498 U.S. at 114 (quoting *United States* v. *Turley*, 352 U.S. 407, 411 (1957)). Because larceny was a lesser included offense of robbery at common law, he maintains that Congress must have intended to make the crime proscribed in Section 2113(b) a lesser included offense of the Section 2113(a) crime. See Pet. Br. 18-21. That argument, however, cannot be squared with the legislative history of Section 2113, or this Court's prior construction of the statute. Those sources demonstrate that Congress did not intend merely to codify the common law in Section 2113, but rather intended to create federal offenses with specific elements designed to address contemporary needs.

1. At common law, larceny was generally defined as the felonious taking and carrying away of the personal goods of another with intent to deprive the owner permanently of his property. See, *e.g.*, 4 W. Blackstone, *Commentaries* *229, *232; 2 W. Burdick, *The Law of Crime* 258-263 (1946). Robbery was an aggravated form of larceny; it contained all of the elements of larceny plus two additional ones: (1) the property must be taken from the person or presence of another (2) by means of force or putting in fear. See 2 W. LaFave & A. Scott, *supra*, §§ 8.2, 8.11, at 333, 437-438. Common law robbery was often defined in simple and undetailed language, such as "the felonious and violent taking of goods or money from the person of another by force or intimidation." *Id.* § 8.11 n.6. The phrase "felonious * * * taking" meant a taking with the intent to deprive the owner permanently of his property. R. Perkins & R. Boyce, *supra*, at 343. Because, under common law, robbery contained all of the elements of larceny (plus the additional elements of personal presence and force),

larceny is a lesser included offense of robbery in those jurisdictions that have retained the common law definitions of the two crimes. See, *e.g.*, *Government of the Virgin Islands* v. *Jarvis*, 653 F.2d 762, 765 (3d Cir. 1981); *United States* v. *Belt*, 516 F.2d 873, 875 (8th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). See generally R. Perkins & R. Boyce, *supra*, at 343 (defining "robbery" as "larceny from the person by violence or intimidation").

2. As already interpreted by this Court's decisions, however, the language and background of Section 2113 reveals that Congress did *not* intend to codify the common law in that provision. Before 1934, banks organized under federal law were protected against embezzlement (Rev. Stat. § 5209 (1875 ed.), as amended by the Act of Sept. 26, 1918, ch. 177, § 5209, 40 Stat. 972), but not robbery, larceny, or burglary, which were punishable only under state law. In 1934, Congress enacted the precursor to Section 2113(a) in response to a series of bank robberies committed by John Dillinger and other criminals who moved from State to State and were able to avoid capture by state authorities. See *Jerome* v. *United States*, 318 U.S. 101, 102-104 (1943) (discussing legislative history of bank robbery statute); *Bell* v. *United States*, 462 U.S. 356, 363-364 (1983) (Stevens, J., dissenting) (same). The Attorney General proposed legislation (S. 2841, 73d Cong., 2d Sess. (1934)) that would have prohibited robbery (§ 4), burglary (§ 3), and theft (§ 2). The 1934 bill passed the Senate in that form, but the House Judiciary Committee, without explanation, struck the burglary and theft provisions from the bill. See *Jerome*, 318 U.S. at 102-104; *Bell*, 462 U.S. at 364 & n.2 (Stevens, J., dissenting). The bill enacted by Congress applied to bank robbery and certain violent

crimes committed during a bank robbery. The bank robbery offense punished "[w]hoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." Act of May 18, 1934, ch. 304, § 2a, 48 Stat. 783.

The 1934 statute left gaps in its protection of federal banks. Because the statute did not cover bank larceny, a person who stole money from a bank without force, violence, or "putting in fear" was immune from federal prosecution. In 1937, the Attorney General proposed amending the bank robbery statute to close that loophole. See H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937); *Bell*, 462 U.S. at 361; *Jerome*, 318 U.S. at 103. Congress ultimately passed a bill that prohibited bank larceny and bank burglary. The 1937 statute's larceny offense punished "whoever shall take and carry away, with intent to steal or purloin," property, money, or anything of value from a bank. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. The 1937 version of bank larceny is identical to the version presently codified in Section 2113(b) in all relevant respects.

In 1948, Congress codified the criminal code. Act of June 25, 1948, ch. 645, 62 Stat. 683. As part of that codification, Congress made several changes to the bank robbery offense. The principal statutory changes were the deletion of the term "feloniously" before the terms "takes" and "attempts" and the substitution of the term "intimidation" for "putting in

fear."[11] The Historical and Revision Notes (Reviser's Note) to Section 2113 are silent on the reason for removing the term "feloniously" from the bank robbery offense. The Reviser's Note stated, in language that mirrored the comprehensive House report accompanying the legislation, that "[n]ecessary minor translations of section references, and changes in phraseology, were made." See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same language used by House Committee to explain change).

3. As the foregoing history demonstrates, the offenses in Section 2113(a) and (b) do not simply replicate their common law antecedents of robbery and larceny. The 1934 and 1937 statutes contained a mix of common law and modern terms. The common law mental element of larceny—"feloniously takes"—was incorporated into bank robbery in 1934 but eliminated in 1948. The mental element of bank larceny—"intent to steal or purloin"—"has no established meaning at common law." *Bell*, 462 U.S. at 360.[12]

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[11] The 1948 revision also amended the bank burglary offense by substituting the phrase "felony affecting such bank and in violation of any statute of the United States, or any larceny" for the term "felony or larceny." The Historical and Revision Notes (Reviser's Note) indicate that that change was intended to conform the statute to the Court's decision in *Jerome*, which held that the term "felony" in the bank burglary offense embraced only those offenses that are felonies under federal law affecting banks protected by the Act. See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same).

[12] In *Turley*, 352 U.S. at 411-412, the Court noted that the term "steal[]" had no accepted common law meaning and was never equated with larceny. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933). Similarly, the term "purloin," which was not included in the common law definition of larceny (see *LeMasters* v. *United States*, 378 F.2d 262, 264 (9th Cir.

This Court has recognized that the 1934 and 1937 statutes contained elements that were broader than the common law. See *Bell*, 462 U.S. at 361 ("Section 2113(b) * * * goes well beyond even this expanded definition" of the common law crime of "larceny," and thus "the statutory language does not suggest that it covers only common-law larceny"). At common law, larceny was limited to thefts of tangible personal property. The statute, however, covers theft of "any property or money or any other thing of value." 18 U.S.C. 2113(a) and (b) (Supp. II 1996). Moreover, common law larceny required a theft from the possession of the owner. By contrast, the bank larceny statute applies when the property is in the "care, custody, control, management, or possession of, any bank." *Ibid.* Based on that broad language, *Bell* held that bank larceny in Section 2113(b) is not limited to common law larcenies. 462 U.S. at 360-361. For similar reasons, there is no sound basis for importing common law elements into Section 2113(a)'s robbery offense that Congress omitted from its text.

1967)), is virtually synonymous with "steal" and encompasses a broader range of theft offenses than common law larceny. See *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978).

An "intent to steal" has a broader scope than the common law's intent to deprive the owner permanently of his property. An intent to steal includes the intent to deprive permanently or for an unreasonable length of time, or in such a way that the owner will thus be deprived of his property. See 2 W. LaFave & A. Scott, *supra*, § 8.5. By contrast, a person does not have a common law intent to steal if he intends to return the very property taken, and it is unclear whether it is a defense that he intended to return equivalent property. *Id.* §§ 8.5(a), 8.5(b), at 358-359, 359-362.

4. Petitioner contends (Br. 18-21) that the deletion of the term "feloniously" from the bank robbery statute in the 1948 codification was inadvertent and was not intended to delete the specific intent element from the offense of bank robbery. He maintains that that amendment was part of Congress's decision to delete most references to "felony" and "misdemeanor" from the Code because those terms were defined in Section 1 of Title 18. 18 U.S.C. 1 (1982).[13]

Petitioner's contention is incorrect. When Congress deleted the term "felony" or "misdemeanor" from a statute because of Section 1, the Reviser's Notes to the statute specifically explained that as the reason for the change. See, *e.g.*, Reviser's Note to 18 U.S.C. 751 ("References to offenses as felonies or misdemeanors were omitted in view of definitive section 1 of this title."), H.R. Rep. No. 304, *supra*, at A67 (same); Reviser's Note to 18 U.S.C. 550 ("Reference to felony * * * was omitted as unnecessary in view of definition of felony in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A47 (same); Reviser's Note to 18 U.S.C. 2076 ("The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of 'misdemeanor' in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A134 (same); Reviser's Note to 18 U.S.C. 1951 ("Provisions designating offense as felony were omitted as

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[13] Congress codified those terms in one section because, before 1948, the lack of uniformity in statutory usages of " felony" and "misdemeanor" had caused courts to diverge when assessing whether a particular crime should be punished as a felony or a misdemeanor. See H.R. Rep. No. 304, *supra*, at A2-A4. Section 1 of Title 18 was repealed by Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 98-473, Tit. II, § 218(a)(1), 98 Stat. 2027.

unnecessary in view of definitive section 1 of this title."), H.R. Rep. No. 304, *supra*, at A131 (same). By contrast, the Reviser's Note to Section 2113(a) is silent on the reason for the deletion of "feloniously"; see also H.R. Rep. No. 304, *supra*, at A134-A135 (same). Thus, petitioner (Br. 18-21) has no basis for asserting that Section 1 was the reason Congress deleted "feloniously" from Section 2113(a).

The disputed deletion was not an isolated action. Congress also deleted the term "feloniously" before the term "takes" in the offense that proscribes a forceful taking within the special maritime and territorial jurisdiction of the United States under Section 2111. 18 U.S.C. 2111; see Act of Mar. 4, 1909, ch. 321, § 284, 35 Stat. 1144.[14] The Reviser's Note gives no reason for that deletion, stating only that "[m]inor changes were made in phraseology." See also H.R. Rep. No. 304, *supra*, at A134 (same). Nor is petitioner aided by the statement in the Reviser's Note that only changes "in phraseology" were made. Where Congress specifically deletes or omits an element of an offense from the statute, the change is substantive despite the Revisers' Notes to the contrary. See *Wells*, 117 S. Ct. at 930; *United States* v. *Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language."). In short, the Reviser's Notes

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[14] Section 2111 of Title 18 provides: "Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."

are not a basis for disregarding the plain language of Section 2113(a), which, unlike Section 2113(b), does not contain a specific intent requirement.

C. PRECEDENT AND CANONS OF STATUTORY INTERPRETATION DO NOT SUPPORT PETITIONER'S ARGUMENT

1. Petitioner contends (Br. 19-20) that *Prince* v. *United States*, 352 U.S. 322 (1957), indicates that bank robbery contains the same intent to steal element as bank larceny. That contention is mistaken. In *Prince* the Court held that Congress did not authorize cumulative punishment for convictions for bank robbery and entering the bank with intent to commit a felony, both of which are prohibited by Section 2113(a). The Court reasoned that Congress inserted the offense of unlawful bank entry into the statute in 1937 to reach a person who entered a bank to rob it but was able to obtain the bank's money without using force or intimidation, and it inserted larceny offenses for similar reasons. The Court stated that the statute could serve the purpose of reaching those acts without being read to create completely independent offenses. Thus, while it "was manifestly the purpose of Congress to establish lesser offenses" in drafting the statute, the Court found no indication that Congress intended to "pyramid" the penalties. *Id.* at 327.

The Court's statements that Congress created lesser offenses in the 1937 legislation and that the mental element of an intent to steal required for unlawful bank entry "merges" into the offense of bank robbery upon consummation of the robbery, 352 U.S. at 328, do not resolve the issue in this case. First, the "narrow" issue before the Court, *id.* at 325, was

whether the statute authorized cumulative punishment for the two offenses, and that was the only issue the Court resolved, *ibid.* Thus, even if this Court were to apply the holding of *Prince* to convictions obtained under the first paragraph of Section 2113(a) and Section 2113(b), such a holding would not compel a trial court to give an instruction for a lesser included offense if the government were to indict the defendant only for a violation of Section 2113(a). A proper application of *Prince* would require only that guilty verdicts under those two provisions be merged into one conviction.

Merger analysis is separate from the lesser offense issue presented here. Under this Court's cumulative punishment jurisprudence, the test is whether Congress intended to authorize *punishment* for the two crimes to be imposed cumulatively, a test that does not necessarily depend upon the elements of the crimes. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11 (1978) (finding cumulative punishment barred for two offenses; but not reaching question whether offenses were greater and lesser offenses). If it so chooses, Congress can authorize cumulative punishment for a greater and lesser offense. Cf. *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981). Thus, it was not necessary for the Court in *Prince* to conclude that bank robbery had an intent-to-steal element to hold that cumulative punishment was barred for bank robbery and unlawful entry of a bank.

Second, although *Prince* remarked in passing that "the purpose of Congress [was] to establish lesser offenses," 352 U.S. at 327, the Court in that case did not analyze the lesser included offense issue by comparing the elements of each offense. This Court's

subsequent decision in *Schmuck* now requires that approach. Indeed, in conducting its analysis, the *Prince* Court did not even have before it a charge of Section 2113(b) bank larceny in the case. Thus, *Prince* does not establish that bank larceny is a lesser included offense of bank robbery.[15]

Finally, the essential holding of *Prince* is that Congress did not intend to pyramid punishments for unlawful bank entry and completed bank robbery; today that result would be achieved under the Sentencing Guidelines. Sentencing under the Guidelines generally takes account of the total course of a defendant's conduct and "groups" the related counts to prevent improper incremental punishment for closely related counts. See United States Sentencing

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[15] Nor does this Court's decision in *United States* v. *Gaddis*, 424 U.S. 544 (1976), support the conclusion that Section 2113(b) is a lesser included offense of bank robbery. In that case, the Court held that a defendant could not be separately convicted for both committing bank robbery in violation of Section 2113(a) and receiving the proceeds of a bank theft in violation of Section 2113(c). It also held that if a jury erroneously did so, the defendant would not be entitled to a new trial if the evidence supported the verdict as to conviction for the Section 2113(a) offense. *Id*. at 550. While *Gaddis* could be taken to imply that bank larceny is a lesser offense of bank robbery (since subsection (c) explicitly refers only to the larceny and not the robbery subsection), that is not a point that the Court explicitly made or on which it relied in its holding. *Gaddis* therefore simply prevents unintended multiple punishments under Section 2113; it does not express a view of greater and lesser offenses under that provision. Indeed, *Gaddis* relied on *Heflin* v. *United States*, 358 U.S. 415, 419 (1959), which had stated that "subsection (c) [of Section 2113] was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." 424 U.S. at 547.

Comm'n *Guidelines Manual*, Ch. 3, Pt. D (1995). Thus, if a defendant in the position of petitioner were to be charged and convicted separately of Section 2113(a) bank robbery and Section 2113(b) bank larceny, the bank larceny conviction would have no effect on petitioner's length of incarceration. See *id.* § 2B3.1 (Robbery Guideline).

2. Petitioner also contends (Br. 18-19) that, under *Morissette*, *supra*, bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948. That proposition is correct, but it does not lead to the conclusion that the mental element in the first paragraph of Section 2113(a) is a specific intent to steal.

In *Morissette*, 342 U.S. at 276, the Court read the federal theft statute, 18 U.S.C. 641, to require proof of an intent to "deprive another of possession of property," despite the absence of such an element from the text of the statute. The Court reasoned that, at common law, larceny offenses had been construed to require such an element; accordingly, the Court should not construe the mere omission from the statute of that intent element as a conscious choice by Congress to eliminate it. 342 U.S. at 250-263. In analyzing the legislative history of Section 641, the Court noted that the statute was enacted as a consolidation of four former theft statutes and that the purpose of the 1948 consolidation was merely to place all theft crimes in a single statute. The Court stated that none of the previous crimes had been interpreted to be crimes without intention; nothing suggested that some were and some were not crimes of intention based on classification or punishment; none appeared to be a petty offense, nor was there an aim to com-

mingle strict liability crimes with crimes requiring intent in the statute. The Court found no "affirmative instruction" from Congress to eliminate intent from the offenses in the statute. *Id.* at 263-273.

The 1948 codification of the bank robbery statute differs in important respects from the history of Section 641. Congress's specific elimination of "feloniously" from the bank robbery section of the statute, while retaining the "intent to steal or purloin" element in the bank larceny section of the statute, showed an "affirmative instruction" to delete an intent to steal from the bank robbery statute. Congress is presumed to know the law when it legislates. See *Albernaz*, 450 U.S. at 341. It knew that it could follow the common law definition of robbery in the statute by simply using the word "rob" or "robbery" in defining the offense, because previous statutes using those terms had been interpreted as having incorporated the common law meaning of the offense. See *Harrison* v. *United States*, 163 U.S. 140, 142 (1896) (statute prohibiting robbery of the mails). Thus, Congress must be presumed to have understood that it was making a substantive change in the law when it deleted the term "feloniously" from the bank robbery statute.

3. The rule of lenity does not justify reading an "intent to steal" element into bank robbery. That rule "applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." *Muscarello*, slip op. 14 (quotations omitted). Lenity thus requires a narrow construction of a statute when the statute contains a "grievous ambiguity or uncertainty." *Staples*, 511 U.S. at 619 n.17 (quoting *Chapman* v. *United States*, 500 U.S. 453, 463

(1991)). In this case, however, the plain language and the legislative history of Section 2113(a) demonstrate that the omission of an "intent to steal" element from bank robbery was deliberate. There is no "grievous ambiguity" in Section 2113(a); thus the rule of lenity is not applicable. See *Muscarello*, slip op. 14.

II. EVEN IF BANK LARCENY IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY UNDER THE STATUTORY ELEMENTS TEST, THERE WAS NO ERROR IN THE CHARGE TO THE JURY

Federal Rule of Criminal Procedure 31(c) entitles a defendant to a lesser included offense instruction only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. *Keeble* v. *United States*, 412 U.S. 205, 208 (1973); *Stevenson* v. *United States*, 162 U.S. 313, 314-315 (1896). Thus, a factual dispute must exist as to an element of the greater offense that, if resolved in the defendant's favor, would still result in a conviction on the lesser offense. See *Sansone* v. *United States*, 380 U.S. 343, 350-351 (1965); see also 1 L. Sand et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-29. If there is no factual dispute, the court need not give a charge for the lesser included offense. See, *e.g.*, *United States* v. *Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); *United States* v. *Payne*, 805 F.2d 1062, 1067 (D.C. Cir. 1986). Thus, in addition to *all* of the elements of the uncharged offense being encompassed within the charged offense and to having *fewer* elements than the charged offense, the evidence must support a conviction on the lesser, but not the greater, offense charged. See

Schmuck, 489 U.S. at 717 & n.9; *Sansone*, 380 U.S. at 350; *Berra* v. *United States*, 351 U.S. 131, 134 (1956).

The district court in this case properly concluded that no rational jury could find petitioner guilty of bank larceny without also concluding that he was guilty of bank robbery. J.A. 45. Petitioner's contrary claim, which the district court correctly rejected, rests on the assumption that a jury could find that he obtained funds from the banks with intent to steal them—and thus was guilty of bank larceny—without also finding that he used intimidation to obtain the money. Despite petitioner's attempt to solicit witness testimony that they could not "see" intimidation, the evidence showed that intimidation occurred.[16]

More importantly, as the district court properly concluded, no reasonable juror could find otherwise, as there was no evidence to suggest that the tellers handed petitioner thousands of dollars in bank money voluntarily and of their own free will, *i.e.*, without intimidation. Certainly there was no evidence that the tellers were petitioner's accomplices. J.A. 15, 45 ("Clearly, there is no basis to suggest that this money was taken with the compliance of these

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[16] Petitioner held up a sign in the first bank saying it was a "HOLD UP," and threw bait money back at the teller; in the second bank, he gestured to his coat in a way that suggested that he had a concealed gun. See pp. 2-3, *supra*. On such facts, other courts have upheld a finding of intimidation. See, *e.g.*, *United States* v. *Hopkins*, 703 F.2d 1102, 1103 (9th Cir.), cert. denied, 464 U.S. 963 (1983). Moreover, the evidence showed that both tellers were terrified. One lost control of her bladder, and both testified as to their fear. Pet. App. 36-37 (letter opinion of district court on defendant's motions for a new trial, for acquittal, and for downward departure at sentencing).

tellers."). Nor was there evidence that petitioner filled out a withdrawal slip or performed any other act that would cause a teller voluntarily to hand him cash. J.A. 10 ("This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers."). To the contrary, the evidence can support only one conclusion: Far from handing petitioner thousands of dollars voluntarily and of their own free will, the tellers handed petitioner the money he demanded because he took it "by intimidation" within the meaning of Section 2113(a). J.A. 10, 15, 45. Because no reasonable juror could reach the contrary conclusion, no bank larceny instruction was required, even if this Court were to conclude that bank larceny is a lesser included offense of bank robbery under the statutory elements test. *Ibid.*[17]

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[17] Because the same analysis will generally apply in bank robbery prosecutions, the question whether bank larceny is a lesser included offense of bank robbery would rarely affect the trials or results in bank robbery prosecutions. Cases in which bank robbery defendants are able to present plausible evidence that the tellers handed over money voluntarily, *i.e.*, without intimidation, are infrequent at best. It thus comes as no surprise that the vast majority of cases that even mention the issue presented in this case have upheld the trial court's refusal to give a bank larceny instruction on the ground that it is not supported by the evidence. See, *e.g.*, *United States* v. *Cornillie*, 92 F.3d 1108, 1109-1110 (11th Cir. 1996); *United States* v. *Sandles*, 80 F.3d 1145, 1147 n.1 (1996); *United States* v. *Walker*, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 517 U.S. 1250 (1996); *United States* v. *Lajoie*, 942 F.2d 699 (10th Cir.), cert. denied, 502 U.S. 919 (1991); see also *United States* v. *Perry*, 991 F.2d 304, 310-311 (1993) (declining to address the appellant's contention that bank larceny is a lesser included

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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offense because no rational jury could find that the teller handed money to the defendant voluntarily).