GRANTED

No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER FLOYD J. CARTER

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The court of appeals' opinion is unreported. Its judgment and opinion are provided at pages 78 to 87 of the Joint Appendix. The district court's opinion, also unreported, was stated on the record at trial and is provided in the Joint Appendix. J.A. 23-32.

JURISDICTION

The court of appeals entered judgment in this case on June 16, 1999. J.A. 78-79. Mr. Carter filed his petition for a writ of certiorari on August 12, 1999. The petition was granted on December 13, 1999. J.A. 88. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The central statute in this case is the "Bank robbery and incidental crimes" provision of Chapter 103 ("Robbery and Burglary") of Title 18. The complete text of this statute, 18 U.S.C. § 2113, is set forth in the statutory appendix to this brief. 1a-3a The statutory appendix also includes the pre-1948 version of the statute, 12 U.S.C. § 588b. 4a-5a Congress made the 1948 amendments, in part, to conform the statute with 18 U.S.C. § 1 (since repealed), also provided in the statutory appendix. 5a

STATEMENT OF THE CASE

The federal criminal code today defines thousands of crimes, and Congress adds still more prohibitions to it in virtually every session. Some of the code's proscriptions are enacted only after the most careful drafting and thorough deliberation. Judicial construction of these particular laws may well be a straightforward affair. But other criminal prohibitions are the product of less meticulous drafting and more hurried consideration. Some of these latter statutes have been in the code for many decades, while others – although once exemplars of clarity – present a muddier picture resulting from congressional additions and deletions. Interpretation of these more workaday statutes would be chaotic and unpredictable if the federal courts were to approach the matter with a literalism that is ahistorical, shut off from centuries of practice that the common law embodies and that are both the original historical foundation for these statutes and the guide for subsequent legislative amendments. For these reasons, this Court has long held that the courts can and *must* look to the Anglo-Saxon common law of crimes to guide and inform their construction of federal criminal law. Inexplicably, the United States Court of Appeals for the Third Circuit set its face against this Court's precedent when it interpreted the bank larceny and robbery provisions at issue in this case. The resulting misinterpretation of the statute cannot stand.

1. On September 9, 1997, petitioner Floyd J. Carter, unarmed and wearing a ski mask to conceal his identity, ran into the Collective Savings Bank in Hamilton, New Jersey, for the purpose of stealing money from the bank.

C.A. App. 165, 155.[1] He had waited outside the bank until he thought all the customers had left. *Id.* at 156 ("I thought nobody was in there."). On his way into the bank Carter bumped into a customer as she was walking out the door. *Id.* With only one goal in mind – to "take the money and run" – Carter quickly stepped around the customer. *Id.* at 157. He proceeded to an unoccupied teller station, specifically so that he would not "scare nobody or nothing." *Id.* at 159-60.

Mr. Carter jumped over the unoccupied teller station, pulled open the drawer, and emptied it of its money. C.A. App. 160. He ran to two other drawers behind the counter, emptying them into a bag as well. *Id.* As Carter was filling his bag, he told the tellers not to worry and assured them that he would not hurt anybody. *Id.* at 160-61. After he finished collecting money from the open teller drawers, he went back to the unattended teller station to avoid direct contact with the tellers and jumped back over the counter. *Id.* at 162. He seized approximately $16,000 in cash from the teller stations. *Id.* at 101-02; J.A. 82. As he ran out the door, petitioner told the bank employees, "Don't bother following me, I run fast." C.A. App. 164.

Later that same day, the police caught Mr. Carter.[2] During questioning by Special Agent James Maxwell, Federal Bureau of Investigation, Carter "admitted that he

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[1] "C.A. App.," followed by a page number, refers to the appendix filed with petitioner's brief in the Third Circuit.

[2] Terry Stilwell, Carter's getaway driver, J.A. 82, was also caught that day. He entered into a plea agreement and was sentenced to 28 months in prison. C.A. App. 5-6.

went into the bank, he took the money, and he said he did not use a weapon." C.A. App. 116-17. Specifically, Carter told Special Agent Maxwell that he went to the bank so that he could "snatch a money bag," saying "I went in the bank and took the money, that's what I did." *Id.* at 121. Indeed, Mr. Carter never denied his involvement, his conduct, or the facts surrounding the theft at the Collective Savings Bank. He was charged in September 1997 in the District of New Jersey with bank robbery in violation of 18 U.S.C. § 2113(a). J.A. 2-3. After admitting to all the basic facts, C.A. App. 116-17, Carter pled not guilty to the charge of bank robbery, *id.* at 3 (Docket Entry No. 5).

2. At a status conference on January 20, 1998, the district court addressed Mr. Carter's pretrial motion requesting that the court instruct the jury on the lesser included offense of bank larceny.[3] J.A. 10-15. The court preliminarily concluded that it would be improper to give an instruction that bank larceny is a lesser included offense of bank robbery. *Id.* In reaching this conclusion, the district court expressly relied on the Third Circuit's decision in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998) (following petitioner's death). According to the district court, "[i]t's a legal decision and we simply, by analyzing the text of these two statutes, the bank robbery and the bank larceny statute, *we decline to follow the majority of the circuits*" on the lesser included offense question. J.A. 14 (emphasis added).

[3] The motion and the corresponding proposed jury charge are provided in the joint appendix. J.A. 4-9.

3. Mr. Carter's trial lasted for two days in January 1998. Carter moved for acquittal after the close of Respondent's case, arguing that Respondent failed to produce sufficient evidence to sustain a conviction. J.A. 16-20. The district court denied the motion for acquittal, *id.* at 23-32, and indicated that the requested larceny instruction would not be given to the jury, *id.* at 29-32. In doing so, the district court again relied on the *Mosley* decision, explaining that "as a matter of law in this Circuit . . . the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense." *Id.* at 30. At the close of all the evidence, petitioner renewed his motion for acquittal, and the motion was again denied. C.A. App. 191-92. The court instructed the jury on the charge of bank robbery alone. J.A. 44-63. The jury returned a verdict of guilty on January 23, 1999. J.A. 64, 71.

4. Prior to sentencing, Mr. Carter was indicted in the Eastern District of Pennsylvania on three counts of bank larceny, C.A. App. 263-65, on the basis of conduct remarkably similar to that for which he was convicted of bank robbery in the District of New Jersey. *See* Presentence Investigation Report at ¶31.[4] In each instance, Carter had run into a bank wearing a ski mask, jumped over a teller counter, and taken money from a teller drawer. *Id.* at ¶31. Carter pled guilty to the Pennsylvania indictment pursuant to Federal Rule of Criminal Procedure 20, and

[4] Pursuant to Local Appellate Rule 30.3(c), the Presentence Investigation Report was filed with the Third Circuit on appeal.

the case was transferred to New Jersey to be consolidated, for sentencing purposes, with the bank robbery conviction. *Id.* at ¶¶3-8.

The district court initially sentenced Mr. Carter to concurrent prison terms of 215 months for the bank robbery and 120 months for each of the bank larcenies. J.A. 65-66. After Carter moved to amend the judgment, C.A. App. 332, the court resentenced Carter to concurrent prison terms of 215 months for the bank robbery and 24 months for each of the bank larcenies. J.A. 71-73.

5. Mr. Carter appealed his conviction. He argued that, among other things, the district court had erred by refusing to instruct the jury on the lesser included offense of bank larceny.[5] J.A. 83. The Third Circuit concluded that "the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in *Mosley* appropriately rested solely on a legal interpretation of Sections 2113(a) and (b)." J.A. 84. The court of appeals also cited its decision in *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976), in which it had held that "specific intent is not an essential element of a violation of" the bank robbery statute. J.A. 85. Next, the court

[5] Carter also demonstrated that the facts of his case clearly warranted the bank larceny instruction, Petitioner's Opening Third Circuit Brief at 13-17, and argued that the district court should have granted a judgment of acquittal due to insufficient evidence to sustain a conviction, *id.* at 42-43. Carter relied on the testimony of Respondent's witnesses – including Maria Zahn, the customer, C.A. App. 38-42; Marjorie Cudney, the customer service representative, *id.* at 72-73; and Robert Phipps, the branch manager, *id.* at 111 – who consistently testified that Carter made no demands of them or threats against them.

reiterated its conclusion that Congress, in the current robbery statute, did not employ common law language to define bank robbery and bank larceny. *Id.* (citing *Bell v. United States*, 462 U.S. 356, 360 (1983)). Finally, according to the Third Circuit, "[s]ection 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property." *Id.* These were essentially the same reasons the Third Circuit articulated to support its decision in *Mosley*.

SUMMARY OF THE ARGUMENT

At common law, larceny was unquestionably a lesser included offense of robbery. Congress drew on the familiar language of the common law definitions of larceny and robbery to draft the bank larceny and bank robbery provisions at issue in this case. The text and structure of the statute, when interpreted – as they must be – with the guidance and understanding of the common law of crimes, compel the conclusion that the elements of bank larceny are a subset of the elements of bank robbery.

ARGUMENT

In *Schmuck v. United States*, 489 U.S. 705 (1989), this Court adopted the "elements approach" to deciding whether a defendant is entitled, under Federal Rule of Criminal Procedure 31(c),[6] to have the jury instructed on

[6] Rule 31(c) provides, in relevant part, that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c).

a lesser included offense of the crime charged. Under the "elements test,"

> one 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. The required "comparison is [thus] appropriately conducted by reference to the statutory elements of the offense in question." *Id.* at 718.

The Third Circuit erred in concluding that bank larceny is not a lesser included offense of bank robbery for purposes of Rule 31. Indeed, the Third Circuit's conclusion flatly contravenes the properly interpreted text and structure of the bank larceny and bank robbery provisions.

I. Under the Textual "Elements" Test, Bank Larceny is a Lesser Included Offense of Bank Robbery.

Section 2113 of the federal criminal code, Title 18, defines the offense of bank robbery as follows:

> 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 . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (1994 & Supp. III). Section 2113 also sets forth the definition of bank larceny. Specifically, this latter offense is defined, with two grades of punishment, as follows:

> Whoever 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, shall be fined under this title or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not 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, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 2113(b) (1994 & Supp. III).

Applying the textual elements test adopted in *Schmuck v. United States*, 489 U.S. 705, 706 (1989), it is evident that bank larceny represents a textual subset of bank robbery, with elements identical to bank robbery save for the "force and violence, or by intimidation" element of bank robbery. Bank larceny requires proof that the accused took "any property or money or any other thing of value." Bank robbery, too, can be shown by proof that the accused took "any property or money or any other thing of value." That which is taken must also, under both provisions, be proved to "belong[ ] to, or [be] in the care, custody, control, management, or possession

of any bank, credit union, or any savings and loan association."

Bank larceny requires proof that the taking occurred "with intent to steal or purloin." To be sure, these very same words are not found in the bank robbery provision. And it was the absence of these very same words from the definition of bank robbery that led the Third Circuit to "reject the majority view that bank larceny is a lesser included offense of bank robbery." *United States v. Mosley*, 126 F.3d 200, 206 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998). According to the Third Circuit, "[i]t is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the 'intent to steal or purloin.' On the other hand, bank larceny as defined in subsection (b) includes this element." *Id.* at 204.

Schmuck does not require such a mechanical literalism. Even though the Court emphasized in *Schmuck* that the analysis must be "textual," 489 U.S. at 720, it did *not* hold that the very same words that define an element in the lesser included offense must appear in the definition of the greater offense. Rather, what is required is simply "a careful comparison of the statutory elements of" the crimes, *id.*, however those elements may be worded. The Third Circuit's error therefore lies in adopting a sort of "magic words" approach that *Schmuck* itself avoided.

A careful comparison of statutory elements, pursuant to the Court's dictates in *Schmuck*, yields a different result. Although the definition of bank robbery in section 2113(a) does not contain the very words "with intent to

steal or purloin," that definition does contain terms tantamount to "steal or purloin" – namely, "takes . . . from the person of another." "Purloin" is a synonym for "steal," and "steal" is commonly defined as "to take the property of another." *Webster's New Collegiate Dictionary* 937, 1138 (2d ed. 1974). The terms employed in both provisions thus closely correspond with one another and are alternative means for defining the same intent element.

The structure of section 2113 also strongly supports the conclusion that bank larceny is a lesser included offense of bank robbery. First, subsection (c) creates a related "receiving stolen property" crime. Specifically, subsection (c) provides as follows:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

18 U.S.C. § 2113(c). If bank larceny were held not to be a lesser included offense of bank robbery, this unlawful receipt provision would create quite an anomaly. It would be a crime knowingly to receive ill-gotten gains from a bank larcenist but *not* from a bank robber. Why would Congress want to punish one who receives loot from a bank larcenist but not another who receives loot from a bank robber? Because bank larceny *is* a lesser included offense of bank robbery, however, the mystery disappears: anyone who commits the offense of bank robbery

necessarily commits the lesser offense of bank larceny, and thus one who knowingly receives stolen property from a bank robber is just as guilty under section 2113(c) as one who knowingly receives stolen property from a bank larcenist.

The history of section 2113(c) buttresses this conclusion. When this unlawful receipt offense was added to the statute in 1940, Act of June 29, 1940, ch. 455, 54 Stat. 695, the prohibitions on bank robbery and bank larceny were set forth in the *same* part of the statute, subsection (a) of 12 U.S.C. § 588b (1940).[7] And this new offense, set forth in subsection (c), was defined as receiving property "taken from a bank in violation of subsection (a)," *i.e.*, by means of bank larceny or bank robbery. 12 U.S.C. § 588b(c) (1940). The legislative history of the 1940 enactment demonstrates that Congress sought to punish receipt from a bank robber or from a bank larcenist equally.[8] In 1948, when 12 U.S.C. § 588b was recodified at

[7] The resulting version of 12 U.S.C. § 588b is set forth in the statutory appendix to this brief. 4a-5a

[8] *See Prohibiting Receipt, Possession, or Disposition of Money or Property Feloniously Taken From Federal Banks*, H.R. Rep. No. 76-1668, at 1 (1940) ("Present law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover the omission."); *Punishment for Receivers of Loot From Bank Robbers*, S. Rep. No. 76-1801, at 1 (1940) ("The Act of May 18, 1934, made it a crime to feloniously (*a*) take or attempt to take property, or (*b*) to assault persons in such attempt from any bank a member of the Federal Reserve System or organized or operating under the laws of the United States. [¶]This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 fine

18 U.S.C. § 2113, subsection (c) on unlawful receipt was amended to refer to the separate bank larceny offense found in subsection (b), just as it does today. The purpose of this amendment was *not* to restrict the offense to receipt of stolen property from a bank larcenist alone. Rather, as the Reviser's Notes to the 1948 recodification explain, the purpose of the amendment was to ensure that if the stolen property were the result of a bank larceny, the different punishments for petit and grand larceny would also apply to the receiver: "the provisions of subsection (b) measuring the punishment by the amount involved were extended and made applicable to the receiver as well as the thief." House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947).

Second, subsection (a), in addition to defining the offense of bank robbery, also criminalizes "enter[ing] or attempt[ing] to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny." 18 U.S.C. § 2113(a). This provision – defining a type of bank burglary – puts entering a bank with the intent to commit bank larceny on a par with entering a bank with the intent to commit bank robbery.[9] Such parity of treatment suggests that Congress viewed bank

and 10 years imprisonment, or both) to willfully become a receiver or possessor of property taken in violation of the statute."). This legislative history is discussed in *Heflin v. United States*, 358 U.S. 415, 419 (1959), *overruled on other grounds, Peyton v. Rowe*, 391 U.S. 54 (1968).

[9] The same was true under the prior version of the statute. *See* 12 U.S.C. § 588b(a) (1940).

larceny and bank robbery as two points on the lesser/greater offense continuum.

The text and structure of section 2113 thus uniformly indicate that bank larceny is a lesser included offense of bank robbery. However, should any doubt remain, the matter is conclusively resolved by reviewing the Anglo-Saxon common law of crimes.

II. The Bank Robbery and Bank Larceny Provisions Mirror the Common Law, Under Which Larceny is a Lesser Included Offense of Robbery.

On its face, the bank robbery provision appears to lack the specific intent element that appears in the bank larceny provision. Indeed, the bank robbery provision appears to lack an intent element altogether. However, appearances can be deceiving. The specific intent to steal, an element that is common to both bank robbery and bank larceny, has its roots in the common law crimes of robbery and larceny. Congress used common law language to define the bank robbery and bank larceny prohibitions and thus expressly incorporated the specific intent element into the definition of bank robbery.

A. The Common Law of Crimes Guides the Proper Interpretation of Federal Criminal Statutes.

This Court has long recognized that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). Indeed, "[i]t is a familiar 'maxim that a statutory term is generally presumed to have its

common-law meaning.' " *Evans v. United States*, 504 U.S. 255, 257 (1992) (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)); *see also United States v. Turley*, 352 U.S. 407, 411 (1957) ("[W]here 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.") This common law background guides the proper construction of federal criminal statutes, and Congress must express its intent to depart from common law definitions in the clearest terms. Importantly, this interpretive principle has such force that it can mandate the presence of an element in the definition of a federal crime even where the statute makes *no mention* of that element.

For example, in *Neder v. United States*, this Court unanimously held that "materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes." 119 S. Ct. 1827, 1831 (1999). Indeed, the Court so held despite the fact that "none of the fraud statutes [at issue] . . . even mentions materiality." *Id.* at 1839. The operative statutory language was the prohibition, found in all three statutes, on "any scheme or artifice to defraud." *Id.* Recognizing it as a "well-settled rule of construction," this Court explained "that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms." *Id.* at 1840 (internal quotations and modification omitted). In the case of fraud, it was clear that "the common law could

not have conceived of 'fraud' without proof of materiality." *Id.* Materiality was therefore a necessary element of the fraud statutes in question:

> Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* that Congress intended to incorporate materiality unless the statute otherwise dictates.

Id. (internal quotations and footnote omitted). This Court also rejected the government's contention that the existence of other criminal statutes that mention materiality could rebut the presumption of common law meaning, holding that the necessary "rebuttal can only come from the text or structure of the fraud statutes [at issue] themselves." *Id.* at 1841 n.7.

This presumption of common law meaning has special force in the context of determining the requisite level of intent for a federal crime. Indeed, in numerous cases this Court has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[10] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (collecting and analyzing cases).

[10] The only exceptions are strict liability statutes "that regulate potentially harmful or injurious items." *Staples v. United States*, 511 U.S. 600, 607 (1994). "Such public welfare offenses have," however, "been created by Congress, and recognized by this Court, in *'limited* circumstances.' " *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978)) (emphasis added).

For example, in the seminal case of *Morissette v. United States*, 342 U.S. 246 (1952), the Court construed 18 U.S.C. § 641, a general prohibition on the theft of United States Government property.[11] Mr. Morissette had been convicted of "unlawfully, wilfully and knowingly steal[ing] and convert[ing]" spent bomb casings belonging to the United States Government. 342 U.S. at 248. The core of his defense, rejected by both the trial court and the court of appeals, was that "he believed the casings were cast-off and abandoned, that he did not intend to steal the property," *id.*, and that section 641 required proof of an intent to steal, *id.* at 249-50. This Court, after carefully reviewing the several statutes that were drawn together and recodified as section 641, concluded that, despite the trimming of specific intent terminology from the recodified statute, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* at 269 n.28. Rejecting the government's contention that the offense of conversion under section 641

[11] Section 641 provides, as it did when *Morissette* was decided, as follows: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . [s]hall be fined . . . or imprisoned. . . . " *Compare* 18 U.S.C. § 641 (1994) *with Morissette v. United States*, 342 U.S. 246, 248 (1952) (quoting section 641).

required general intent alone,[12] the Court turned to the common law as the touchstone for interpreting the statute:

> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative. . . . [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Id. at 263. The Court thus drew on the common law to imply a specific intent element – the intent to steal – for a statute that, after recodification in 1948 (unlike before),

[12] "That the removal of [the spent casings] was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances." *Morissette*, 342 U.S. at 276 (emphasis in original).

was silent on the question of intent. Put another way, this Court held that, by dropping express requirements of felonious intent from the offenses recodified at section 641 (with Reviser's Notes stating that "[c]hanges were made in phraseology"), Congress was held *not* to have given such "contrary direction." *See id.* at 266 n.28 (emphasis added).

More recently, in *Staples v. United States*, 511 U.S. 600 (1994), the question presented was whether, to obtain a conviction under section 5861(d) of the National Firearms Act, 26 U.S.C. § 5861(d), the government must prove that the defendant knew that the weapon he possessed had the characteristics that brought it within the prohibition of that section.[13] The Court held that the government must prove such knowledge, reasoning in part as follows:

> Section 5861(d) is silent concerning the *mens rea* required for a violation. . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.

511 U.S. at 605. After distinguishing the case law on strict liability offenses, this Court concluded that "the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d)." *Id.* at 619.

[13] Section 5861(d) makes it a crime to possess a fully automatic firearm that is not properly registered with the federal government.

This Court's decisions in cases such as *Morissette* and *Staples* demonstrate that the presumption of common law meaning that attaches to common law terms in federal criminal statutes has special force with respect to the element of intent. In a sense, these cases simply illustrate the basic proposition, long a feature of the common law of crimes, that, "as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all." 4 William Blackstone, *Commentaries* *21. With respect to the question of intent, a review of the common law definitions of larceny and robbery plainly demonstrates that both crimes required proof of the specific intent to steal.

B. At Common Law, Both Larceny and Robbery Required Proof of the Same Criminal Intent To Steal.

At common law, robbery was defined as an aggravated form of larceny. For example, in his chapter on "Offences Against Private Property," Blackstone defined "simple larciny" as "the felonious taking and carrying away of the personal goods of another." 4 William Blackstone, *Commentaries* *230.[14] He emphasized that "[t]his taking, and carrying away, must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*."[15] *Id.* at *232. Interestingly, Blackstone also

[14] Citations are to a facsimile of the first edition of 1765-1769 published by the University of Chicago Press.

[15] "Animo furandi" is the "intent to steal," and "lucri causa" means "for the sake of lucre, or gain." *Black's Law Dictionary* 81, 855 (5th ed. 1979).

observed that the punishment for simple larceny varied depending upon the amount taken: "when it is the stealing of goods above the value of twelvepence, [it] is called *grand* larciny; when of goods to that value, or under, [it] is *petit* larciny." *Id.* at *229. It was also clear, however, that these grades of larceny were "considerably distinguished in their punishment, *but not otherwise*." *Id.* (emphasis added).

Robbery, in turn, was simply a "compound" form of larceny. For Blackstone, "*compound* larciny is such as has all the properties of former, but is accompanied with one of, or both, the aggravations of a taking from one's *house* or *person*," *id.* at *240, and "[l]arciny from the *person* is either *privately* stealing; or by open and violent assault, which is usually called *robbery*," *id.* at *241. Put another way, "previous putting in fear is the criterion that distinguishes robbery from other larcinies." *Id.* at *242. Blackstone thus defined robbery as "[o]pen and violent larciny from the *person*," and "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear." *Id.* at *241. Other treatises on the English common law of crimes recognize the same principles as are set forth in Blackstone's *Commentaries*.[16]

[16] 2 *East's Pleas of the Crown* ch. 16, § 1 (larceny and robbery "are intimately connected, the one being included in the other"), § 124 (robbery, "an aggravated larceny," is the "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear") (1803 ed.); 1 *Hawkins' Pleas of the Crown* ch. 33, § 1 (larceny is "a felonious and fraudulent taking, and carrying away, by any Person, of the mere personal Goods of another, not from the Person, nor out of His house, above the Value of twelve pence"),

Both larceny and robbery required the same criminal intent to steal to be shown. This is illustrated by the fact that, at common law, a charge of robbery could not be sustained where the intent to steal was found lacking. 2 *East's Pleas of the Crown* ch. 16, § 98 at 661-62 (1803 ed.). For example, in *The Fisherman's Case* (1528),[17] a robbery charge was defeated on the ground that the accused gave money in exchange for the victim's property. According to the report of the case in *East's Pleas of the Crown*,

> A traveller met a fisherman with fish, who refused to sell him any; and he by force and putting in fear took away some of his fish, and threw him money much above the value of it: and judgment was respited, because of the doubt whether the intent were felonious on account of the money given.

Id.; *see also* 4 Blackstone, *Commentaries* *242 ("it is doubted, whether the forcing of a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery").

Similarly, taking the property of another from his person by violence under a mistaken claim of right was

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ch. 34, §§ 1, 3 (robbery, a form of "[m]ixt or complicated larceny," is "a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear") (1716 ed.); 2 *Russell on Crimes* 98 ("Robbery from the person appears to be well defined as 'a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear.' "), 101 ("robbery is an aggravated species of larceny") (4th ed. 1865).

[17] *See* 14(2) Digest ¶ 8862 (2d reissue, 1993) (dating *The Fisherman's Case* to 1528).

not robbery. 2 *Russell on Crimes* 105 (4th ed. 1865) ("If a party *bonâ fide* believing that property in the personal possession of another belongs to him, take the property away from such person with menaces and violence, this is not robbery. . . . "). For example, in *Rex v. Hall*, a man indicted for robbing a gamekeeper of trap wire and a captured pheasant was acquitted on the ground that he had a good faith belief that he was recovering his own property. 172 Eng. Rep. 477, 478 (Gloucester Assizes 1828) ("if the Jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of the opinion that the prosecution must fail"). More recently, in *Regina v. Skivington*, the court reversed a robbery conviction, reasoning that the accused's demand for his wife's wages from her employer, although made at knife point, was made under a good faith claim of right. 1 All E.R. 483 (C.A. 1967). According to the court, "larceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defense to larceny, then it negatives one of the ingredients in the offence of robbery." *Id.* at 485.

All these authorities make clear, larceny was a lesser included offense of robbery at common law. The English courts have adhered to this view down to the present time. *See, e.g., Regina v. Desmond*, 3 All E.R. 587, 591 (1964) (reducing robbery conviction to larceny conviction, on ground that in "the present case of robbery with violence, the first thing that the prosecution must do is to prove larceny and then go on to prove that that larceny which they have proved has occurred in certain particular circumstances"). In the United States, at the turn of the

nineteenth century, state courts similarly recognized this feature of the common law crimes of larceny and robbery. *See, e.g., People v. Clary*, 13 P. 77, 78 (Cal. 1887) ("Robbery is larceny, with the element of force or intimidation added."); *Duffy v. State*, 56 N.E. 209, 209 (Ind. 1900) ("It is true, the principal charge against appellant, under the indictment of which he was convicted, is that of robbery. The offense, however, of larceny, is included and involved in that charge."); *State v. Perley*, 30 A. 74, 76 (Me. 1894) ("robbery is characterized by the common law as compound or aggravated larceny"); *People v. Kennedy*, 11 N.Y.S. 244, 246 (N.Y. Gen. Term 1890) ("There can be no robbery without larceny, and hence the accusation of robbery includes that of larceny, the greater including the lesser."); *State v. Hatch*, 116 P. 286, 287 (Wash. 1911) ("Robbery includes larceny; the essential difference between them being the element of force or violence, necessary to establish robbery, but not an essential of larceny."). Accordingly, centuries of case law and commentary specifically confirm that both robbery and larceny required proof of the same criminal intent to steal.

C. Bank Robbery and Bank Larceny Require Proof of the Same Criminal Intent to Steal.

The common law status of larceny as a lesser included offense of robbery is not open to doubt. Congress acted within this tradition when it criminalized bank robbery and bank larceny using the language of Blackstone and other common law authorities.

Section 2113(a) criminalizes "[w]hoever, *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." 18 U.S.C. § 2113(a) (emphasis added). Even putting aside the evolution of the definition since the bank robbery prohibition was first enacted in 1934, *see infra* at 27-30, this current definition obviously incorporates the common law definition of robbery. The similarity of bank robbery's definition to that of common law robbery is striking, as is demonstrated by even a cursory review of common law commentators such as Blackstone ("the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear"), East ("felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear"), and Hawkins ("a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear"). *See supra* at 20-23 & n.16; *see also* 18 U.S.C. § 3559(c)(2)(F)(i) (1994) (classifying the crimes defined in sections 2111, 2113, and 2118 as "robbery" and grouping robbery with many other federal specific intent crimes).

In order to conclude – as the Third Circuit has – that bank larceny is distinguished from bank robbery by the specific intent to steal, one would have to conclude that the bank robbery provision does *not* include such an "intent to steal" element. But that conclusion is squarely at odds with the common law definitions of larceny and robbery that the text of section 2113 so obviously incorporates. Where, as here, the common law serves as the basis for a statute, the "cluster of ideas" that surrounds a

common law term must supply the meaning for that common law term in the statute. *Morissette*, 342 U.S. at 263. Indeed, "under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses," one "must *presume* that Congress intended" to incorporate a specific intent to steal element in its definition of bank robbery "unless the statute otherwise dictates." *Neder*, 119 S. Ct. at 1840. Any superficial textual discrepancies between section 2113(a) and (b) must therefore be resolved by applying the established view of the common law, adopted by Congress, that both robbery and larceny alike require proof of the specific intent to steal.

III. The History of the Statutes at Issue Confirms That the Definitions of Bank Larceny and Bank Robbery are Firmly Rooted in the Common Law.

The bank robbery and bank larceny provisions of 18 U.S.C. § 2113 took their current form in 1948, as part of the overall recodification of federal criminal law in Title 18. The full history of these two provisions consists of three distinct stages: the passage of the original bank robbery act in 1934, the expansion of the act to criminalize bank larceny and unlawful entry in 1937, and the rephrasing of the act as part of the 1948 recodification. At each of these three stages, Congress used the language of the common law to define the offenses of bank robbery and bank larceny. By using this common law language, Congress included the common law specific intent element of robbery in the statutory offense.

A. Congress Used Common Law Language in the 1934 Act.

Bank robbery was first made a federal crime in 1934. The relevant act, in terms taken virtually verbatim from common law sources such as Blackstone, East, and Hawkins, was as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person 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 shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 793; *see, e.g.*, 4 William Blackstone, *Commentaries* *241 (defining robbery as "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear"). The phrase "feloniously takes," in particular, signifies that the criminal intent to steal is an element of the bank robbery offense. *See United States v. Turley*, 352 U.S. 407, 410 n.4 (1957) ("felonious" means "having criminal intent"); *Black's Law Dictionary* 555 (5th ed. 1979) ("Felonious taking. As used in the crimes of larceny and robbery, it is the taking with intent to steal."). Congress thus used the language of the common law to create the offense of bank robbery, including the intent to steal as an element thereof.

The legislative history of the 1934 act further supports the conclusion that Congress included the common law intent element in the bank robbery provision. The bill was introduced as one of thirteen measures proposed by

the Attorney General for helping local law enforcement cope better with the interstate activities of organized crime. 78 Cong. Rec. 2946-47 (1934) (introducing bills prepared by the Department of Justice, with an explanatory letter from the Attorney General). According to the Justice Department, the bank bill in particular was "directed at one of the most serious forms of crime committed by gangsters who operate habitually from one State to another in robbing banks." S. Rep. No. 73-537, at 1 (1934) (quoting Department of Justice memorandum); *see also Jerome v. United States*, 318 U.S. 101, 102 (1943) (bank robbery act responded to concerns "over interstate operations by gangsters against banks – activities with which local authorities were frequently unable to cope").

In its original form, the bill criminalized not only bank robbery, but also bank burglary and bank larceny. S. 2841, 73d Cong. §§ 2-4 (1934) (reprinted at 78 Cong. Rec. 5738 (1934)). The House Judiciary Committee, however, eliminated the larceny and burglary subsections out of concern for the breadth of the measure, putting the bill in the form in which it was eventually passed. *See* 78 Cong. Rec. 8132-33 (1934) (House debate on and passage of S. 2841); H.R. Rep. 73-1598, at 1 (1934) (conference report recommending that "the Senate recede from its disagreement to the amendments of the House"). As Representative Hatton Sumners of Texas explained in debate, "we are going rather far in this bill, since all the property is owned, as a rule, by the citizens of the community where the bank is located. The committee was not willing to go further. . . . " 78 Cong. Rec. 8133 (1934). The House of Representatives' emphasis on a narrow act, limited to bank robbery, supports the conclusion that this offense,

like its common law analogue, includes an intent element. If the act had eliminated the specific intent element, thereby broadening bank robbery beyond the familiar state law definition of robbery, it would have swept a broader range of conduct within its grasp.

The jurisdictional provision of the 1934 act sheds further light on Congress' intent in enacting the bank robbery prohibition. According to the act, "[j]urisdiction over any offense defined in this Act shall not be reserved exclusively to courts of the United States." Act of May 18, 1934, ch. 304, § 4, 48 Stat. 793. In other words, state courts – the courts that had long been presiding over common law and state statutory robbery trials – could try federal bank robbery cases.[18] This jurisdictional provision, present in the bill from its inception, manifested Congress' intent to frame a criminal measure that would assist – not displace – local law enforcement efforts. This intent only to assist the states is furthered by a construction of bank robbery that incorporates, rather than rejects, the long-standing intent element of common law robbery. *See Jerome*, 318 U.S. at 105 ("[W]here Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute."); *In re Lewis*, 83 F. 159, 160-62 (D. Wash. 1897) (ordering release of United States Treasury Department

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[18] As the House Report on the bill explained, after noting the jurisdictional provision, [t]here is no intention that the Federal Government shall supersede the State authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals. H.R. Rep. No. 73-1461, at 2 (1934).

agents held on state law robbery charges based on their execution of a faulty warrant because "the felonious intent necessary to make robbers of them [was] entirely lacking"); *State v. Morris*, 122 S.E. 914, 917 (W. Va. 1924) ("Robbery is an aggravated form of larceny, and the intent to steal the property at the time it is first taken is just as essential to the crime of robbery as the use of force in the taking."); *State v. Culpepper*, 238 S.W. 801, 803 (Mo. 1922) ("If McGrath owed Culpepper $175 for commissions on the Todd and Robinson deals, or if Culpepper believed he owed him that sum, then the defendant was not guilty of robbery, because the animus furandi, the felonious intent, was wanting.").

B. The 1937 Act, Like the 1934 Act, Uses Common Law Language.

In 1937, Congress amended the 1934 measure to criminalize bank larceny and unlawful entry of a bank, while leaving the definition of bank robbery the same. *See* Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 (adding larceny and unlawful entry offenses). The new bank larceny provision, like the existing bank robbery provision to which it was added, used the language of the common law:

> [W]hoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Id. at 749.[19] The similarity to the common law definition of larceny is plain. *See* 4 William Blackstone, *Commentaries* *230 (defining larceny as "the felonious taking, and carrying away, of the personal goods of another"). And, just as was the case at common law, this bank larceny definition included penalty gradations to distinguish petit from grand larceny. *See id.* at *229 (petit and grand larceny "are considerably distinguished in their punishment, but not otherwise"). Finally, the title of the 1937 act, "AN ACT To amend the bank-robbery statute to include burglary and larceny," expressly adopts the nomenclature of common law crimes. This usage in the act's title provides further support for the conclusion that Congress intended bank larceny to be a lesser included offense of bank robbery. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (" 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute") (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

The 1937 amendment, like the anti-robbery statute before it, was prompted by a request of the Attorney General. According to the Attorney General,

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[19] The text of the bank larceny and unlawful entry provisions as they stood before they were recodified, from 12 U.S.C. § 588b to 18 U.S.C. § 2113, is provided in the statutory appendix. 4a-5a

> [t]he fact that the [1934] statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear – necessary elements of the crime of robbery – and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

H.R. Rep. 75-732, at 1-2 (1937) (reprinting letter from Attorney General); *see also* S. Rep. 75-1259, at 1-2 (1937) (reprinting same letter). The facts the Attorney General summarized clearly constitute common law larceny, but not robbery. The purpose of the bill was thus to create, among other things, the lesser included offense of bank larceny. *See Prince v. United States*, 352 U.S. 322, 327 (1957) ("The only factor stressed by the Attorney General in his [1937] letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. *It was manifestly the purpose of Congress to establish lesser offenses.*") (emphasis added).

C. The 1948 Recodification Retained the Specific Intent to Steal as an Element of Both Larceny and Robbery.

As this Court has observed, "[t]he 1948 Revision was not intended to create new crimes but to recodify those

then in existence." *Morissette v. United States*, 342 U.S. 246, 270 n.28 (1952). The bank robbery and bank larceny provisions were recodified as subsections (a) and (b), respectively, of 18 U.S.C. § 2113, in substantially the same terms they have today. Act of June 25, 1948, ch. 645, § 2113, 62 Stat. 683, 796-97 (1948).

The textual change of note for the present case is the deletion of the modifier "feloniously" from the bank robbery provision. *Compare* 12 U.S.C. 558b(a) (1940) ("Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another . . . ") *with* 18 U.S.C. § 2113(a) (1948) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . "). As was noted above, the phrase "feloniously takes" is the common law term signifying the element of criminal intent to steal. However, it is clear for at least three reasons that Congress did not intend to eliminate the specific intent element of bank robbery by dropping the modifier "feloniously" from the 1948 recodification.

First, the legislative history of the 1948 recodification indicates that Congress did not eliminate the intent to steal element from the bank robbery provision. According to the comprehensive House Judiciary Committee report that accompanied the 1948 recodification, the only significant change in section 2113 was to the unlawful entry provision of subsection (a). *See* House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947). This change – replacing the phrase "any felony or larceny" with "any felony affecting such bank and in violation of any statute of the United States,

or any larceny" – was made in order to conform the definition of the unlawful entry offense to this Court's holding in *Jerome v. United States*, 318 U.S. 101 (1943).[20] *See* H.R. Rep. No. 80-304, at A135 ("Change conforms with *Jerome*."). Other changes to the recodified provisions, such as the deletion of "feloniously" from the robbery provision, were described merely as "changes in phraseology." *Id.* The deletion of "feloniously" from section 2113 is also attributable to one of the general goals of the 1948 recodification: namely, eliminating unnecessary felony classifications. As the Seventh Circuit explained in *United States v. Richardson*,

> Generally, in the 1948 codification of the criminal statutes an effort was made to avoid redundant use of the words "felony" and "misdemeanor" and the unnecessary use of the words "and on conviction thereof" where they preceded "shall be punished." Most references to "felony" and "misdemeanor" were considered redundant because § 1 of Title 18 [now repealed] defined them for purpose of the entire code.

687 F.2d 952, 957 (7th Cir. 1982) (internal citation omitted).

Second, this Court long ago rejected the contrary conclusion when interpreting another federal theft crime

[20] In *Jerome v. United States*, this Court held that the unlawful entry offense set forth in 12 U.S.C. § 588b(a), the predecessor to 18 U.S.C. § 2113(a), "exclude[d] state felonies and . . . include[d] only those federal felonies which affect[ed] the banks protected by the Act." 318 U.S. 101, 108 (1943) (footnote omitted).

in *Morissette*. *Morissette*, like the case at bar, involved a statute where the expressed intent element was dropped from the text as part of the 1948 recodification. *See Morissette*, 342 U.S. at 266 n.28 (reviewing legislative history of 18 U.S.C. § 641 and its antecedents). As was explained above, *supra* at 17-20, this Court held in *Morissette* that the intent element nevertheless remained part of the definition of the theft crime at issue, holding that Congress must do more than fail to mention an intent element in the definition of a crime if it wishes to delete that element from the federal version of a common law crime. *See* 342 U.S. at 263 ("In such case, absence of contrary direction [from Congress] may be taken as satisfaction with widely accepted definitions, not as a departure from them.").[21] By parity of reasoning, the deletion of the common law criminal intent term "feloniously" from the statute at issue here cannot, by itself, be construed as an elimination of the intent element from the antecedent bank robbery statute.

Third, Congress' 1948 deletion of "feloniously" cannot reasonably be construed as somehow transforming the specific intent to steal element in the definition of bank robbery into a broader general intent requirement

[21] In *United States v. Mosley*, the Third Circuit erred by turning the presumption articulated by *Morissette* on its head, reasoning that Congress should have expressed its desire to *preserve*, rather than *eliminate*, the element of criminal intent from the bank robbery statute. *See* 126 F.3d 200, 205 (3d Cir. 1997) ("Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime."), *cert. dismissed*, 525 U.S. 120 (1998).

whereby the prosecution need only prove that the defendant's acts were not compelled or mistaken. This Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), forecloses that conclusion. In *Prince*, the Court rejected the government's contention that, under 18 U.S.C. § 2113, "unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation." *Id.* at 324. Mr. Prince, having been convicted of both unlawful entry and bank robbery, was sentenced to 20 years for robbery and 15 years for unlawful entry, to be served consecutively. *Id.* at 324. After analyzing the legislative history of section 2113, *id.* at 325-28, this Court concluded that the unlawful entry offense merges with the completed robbery. Critical to the Court's conclusion was the premise that both unlawful entry and robbery share the same criminal intent to steal:

> the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (footnote omitted; emphasis added). Thereafter, the Court adhered to this view of the statute in *Heflin v. United States*, 358 U.S. 415, 419 (1959) ("We ruled that entering with intent to steal, which is 'the heart of the crime,' 'merges into the completed crime if the robbery is consummated.' ") (quoting *Prince*), *overruled on other grounds, Peyton v. Rowe*, 391 U.S. 54 (1968). Of course, the intent to steal at the "heart" of unlawful entry cannot merge into the offense of bank robbery unless bank robbery itself requires the intent to steal.[22]

In sum, the history of the bank robbery and bank larceny provisions, as well as this Court's interpretation of both the bank robbery provision and other federal theft statutes, demonstrates that the common law "intent to steal" element remains a feature of section 2113(a). Although the bank robbery provision may not appear to require proof of the specific intent to steal in those very words, Congress clearly incorporated a specific intent element in its definition of bank robbery by using common law terminology. Bank larceny, too, requires proof of

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[22] The decision in *Bell v. United States*, 462 U.S. 356 (1983), does nothing to reduce the force of *Prince* in this case. In *Bell*, the Court held that the "take" element of bank larceny is satisfied by proof that the defendant took the property by false pretenses, a method of taking that was outside the scope of larceny at common law. 462 U.S. at 358-62. Importantly, the "take" element itself remained intact: as the Court emphasized, section 2113(b) "does not apply to a case of false pretenses in which there is not a taking and carrying away." *Id.* at 361.

There is, of course, nothing incongruous in concluding that one aspect of a federal criminal offense has been broadened from its common law confines, while another aspect of the very same offense continues to hew to the common law definition for that offense. For example, this Court recently construed the Hobbs Act, 18 U.S.C. § 1951, in just this manner. *See Evans v. United States*, 504 U.S. 255, 263-64 (1992) ("Although the present statutory text is much broader than the common law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common-law definition.") (footnote omitted).

this same specific intent to steal. The textual elements of bank larceny are therefore a subset of the elements of bank robbery, making bank larceny a lesser included offense of bank robbery. *See Schmuck v. United States*, 489 U.S. 705, 716 (1989).

IV. Bank Larceny is not Distinguished From Bank Robbery by Separate "Carries Away" or Valuation Elements.

Respondent contends that "bank larceny has three textual elements that are omitted from the bank robbery offense: (1) an intent to steal; (2) a 'carries away' actus reus element; and (3) a requirement that the property taken have a monetary value." Brief for United States Regarding Certiorari at 6. As has been shown above, both bank robbery and bank larceny require proof of the specific intent to steal. The other purported differences on which Respondent relies are equally illusory. When the bank robbery and bank larceny provisions are interpreted, as they must be, in light of the common law, the seeming elements of "carries away" and "monetary value" vanish.

A. Both Bank Robbery and Bank Larceny Require That the Property be Carried Away.

Respondent contends that the purported difference between the "takes" element of bank robbery and the "takes and carries away" element of bank larceny prevents the latter from being a lesser included offense of the former. This argument is flawed, however, because it fails to take proper account of the common law. Indeed, this

textual difference between the bank robbery and bank larceny provisions hews to the language of the common law and thus provides further support for Petitioner, not Respondent.

First, the "carries away" portion of the bank larceny statute is firmly rooted in the common law's "asportation" requirement. *See* 4 William Blackstone, *Commentaries* *231 ("There must not only be a taking, but a *carrying away*: *cepit et asportavit* was the old law-latin."). Congress thus used common law language – and, it must be presumed, common law meaning – to define bank larceny. *See, e.g., Neder*, 119 S. Ct. at 1839-41.

Second, at common law, robbery plainly shared larceny's asportation requirement. *See* 4 William Blackstone, *Commentaries* *240-41 ("*compound* larciny is such as has all the properties of the former, but is accompanied with one of, or both, the aggravations of a taking from one's *house* or *person*"; "Open and violent larciny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear."). At the same time, however, robbery was often defined in simple and "undetailed language" that made *no* mention of asportation. *Id.*; 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986). The use of undetailed language is thus nothing more than an adoption of the shorthand of common law sources. As LaFave & Scott observes, "American statutes do not generally spell out the eight elements [of robbery]; they define the crime of robbery in different ways, often in the somewhat undetailed language used by Blackstone, Hawkins, Hale and East in defining common law robbery." *Id.* In short, the failure to

mention the asportation requirement when defining robbery does not indicate its absence.

In light of the foregoing considerations, the only fair conclusion to reach is that, by omitting the phrase "carries away" from the definition of bank robbery, Congress simply followed common law usage and thus tacitly included the asportation requirement as an element of the offense. Put another way, section 2113(a) simply exhibits the "undetailed language" of American robbery statutes that is described by LaFave & Scott. The apparent "carries away" textual difference between bank larceny and bank robbery, which vanishes when viewed through the lense of common law understanding, provides Respondent no support.

B. Bank Larceny has Separate Grades, but Does Not Contain a Separate Valuation Element.

Respondent contends that bank larceny, unlike bank robbery, requires proof of a monetary value for the stolen property. From this Respondent concludes that bank larceny requires proof of a separate element not found in the definition of bank robbery, and therefore cannot be a lesser included offense of bank robbery. Again, Respondent utterly ignores the common law terminology at work in the statute.

As was noted above, *supra* at 17, at common law simple larceny comprised two grades, grand larceny – "when it is the stealing of goods above the value of twelvepence" – and petit larceny – "when of goods to that value, or under." 4 William Blackstone, *Commentaries* *229. Importantly, these two grades of simple larceny

were "considerably distinguished in their punishment, *but not otherwise.*" *Id.* (emphasis added). Moreover, the value of the goods taken was not considered an element of larceny, nor did the distinction between petit and grand larceny prevent larceny from being considered a lesser included offense of robbery. *Id.* at *230-36 (discussing elements of larceny), *241 (defining robbery as "open and violent larciny from the *person*"). In modern parlance, the value of the money stolen was a sentencing factor, not an element of the offense.

In this respect, as in virtually every other, the definition of bank larceny hews to the common law. Section 2113(b) prescribes two degrees of punishment for larceny in two separate paragraphs, the severity of the punishment depending upon the value of the property taken from the bank. Specifically, where the value exceeds $1,000, punishment can include imprisonment for up to ten years, but where the value does not exceed $1,000, punishment cannot exceed one year. *Compare* 18 U.S.C. § 2113(b), ¶ 1 *with* 18 U.S.C. § 2113(b), ¶ 2. As the Reviser's Notes to the 1948 recodification explain, "the provisions of subsection (b) measur[e] the punishment by the amount involved." House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947). In other words, just as at common law, the $1,000 threshold serves "as the dividing line between petit larceny and grand larceny." *Id.*; *see also* Economic Espionage Act of 1996, Pub. L. No. 104-294, § 606(a), 110 Stat. 3488, 3511 (raising threshold from $100 to $1,000).

Accordingly, in a bank larceny prosecution, the sole function served by proof of the precise monetary value of the stolen property (as opposed to proof that the property

has some value greater than $0) is to distinguish between the two levels of punishment provided in section 2113(b). With respect, however, to the basic theft element – that one be shown to have taken "any property or money or any other thing of value" – the bank robbery and bank larceny provisions are *identical*. *See* 18 U.S.C. § 2113(a), (b). It could thus scarcely be more plain that the differing degrees of punishment for bank larceny do not constitute a separate element that distinguishes bank larceny from bank robbery.[23]

This conclusion is further bolstered by the basic structure of section 2113, which separates different offenses that contain additional statutory elements into different lettered paragraphs, *see* 18 U.S.C. § 2113(d) (adding "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device"), § 2113(c) (adding "kills any person, or forces any person to accompany him without the consent of such person"), rather than lumping them together in a single lettered paragraph. On this model, if grand larceny contained an additional statutory element when compared to petit larceny, it would be set out in a separate lettered paragraph.

Finally, the conclusion that the amount of money taken in a bank larceny is a sentencing factor, rather than an element of bank larceny, not only follows the common

[23] It is worth noting that the Third Circuit expressly rejected the notion that the different grades of bank larceny define an element distinguishing the offense from bank robbery. *See United States v. Mosley*, 126 F.3d 200, 204 n.2 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998).

law definitions of larceny and robbery and the structure of the statute, it also fully comports with this Court's decisions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 119 S. Ct. 1215 (1999). Both cases rejected the notion that the analysis turns merely on whether the feature in question is recited in the provision that defines the crime. *See Almendarez-Torres*, 523 U.S. at 228 (looking "to the statute's language, structure, subject matter, context, and history"); *Jones*, 119 S. Ct. at 1220 (looking beyond "text alone" to the "traditional treatment of certain categories of important facts"). In both cases, the key to determining whether a feature of a federal criminal law was an element of the crime or a sentencing factor was how that feature was traditionally treated. In *Almendarez-Torres*, the feature in question was recidivism, and, because recidivism "is as typical a sentencing factor as one might imagine," 523 U.S. at 230, it was held to be a sentencing factor rather than an element of the crime. Similarly, in *Jones*, the feature in question was the infliction of serious bodily injury, and, because serious bodily injury "has traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery," 119 S. Ct. at 1220, it was held to be an element of the crime rather than a sentencing factor.

Consistent with the reasoning of *Almendarez-Torres* and *Jones*, the $1,000 dividing line between the two paragraphs of section 2113(b) is a sentencing factor, not a separate element of the offense. It cannot reasonably be disputed that, at common law, the amount of money that was taken in a larceny went to the sentence imposed. It was not viewed as an element of the crime. *See* 4 William

Blackstone, *Commentaries* at *230-36. In other words, Mr. Blackstone's "twelvepence" has become Congress' "$1,000." *Id.* at *229. As a result, it is appropriate to conclude that Congress intended the amount of loss in a bank larceny prosecution to be treated as a sentencing factor rather than as an element of the crime. *See also* 18 U.S.C. § 661 (1994) (proscribing larceny in "the special maritime and territorial jurisdiction of the United States" and providing two grades of punishment); *United States v. Belt*, 516 F.2d 873, 875 (8th Cir. 1975) ("The element of value in [18 U.S.C. § 661] establishes the degree of the larceny committed for purposes of prescribing punishment; it is not an essential element of the offense.").

Furthermore, the United States Sentencing Commission has made the amount of loss resulting from an offense the preeminent factor in establishing a defendant's punishment for theft offenses. *See United States Sentencing Guidelines Manual* § 2B1.1(b)(1999) (increasing the base offense level in twenty increments based upon the amount of loss.). The amount of loss in a federal theft offense is, like recidivism, about "as typical a sentencing factor as one might imagine." *See Almendarez-Torres*, 523 U.S. at 230.

CONCLUSION

For the foregoing reasons, Mr. Carter respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

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