TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Summary of argument	5
Argument	9
I. Bank larceny is not a lesser included offense of bank robbery	9
A. Bank larceny contains statutory elements that bank robbery does not have	10
1. Bank larceny, unlike bank robbery, requires proof of a specific intent to	
1. Bank larceny, unlike bank robbery,	
1. Bank larceny, unlike bank robbery,	

TABLE OF AUTHORITIES

Cases—Continued: Page

Moskal

Cases—Continued: Page

State v. *Thompson*, 558 P.2d 1079 (Kan. 1976) 18
State v. *Valdez*, 977 P.2d 242 (Kan. 1999) 25
Stevens v. *United States*, 297 F.2d 664 (10th Cir. 1961) 27
Stevenson v. *United States*, 162 U.S. 313 (1896) 43
Traxler v. *State*, 251 P.2d 815 (Okla. Crim. App. 1953) 18
United States v. *Arambasich*, 597 F.2d 609 (7th Cir..0039) 15
United States v. *Bailey*, 444 U.S. 394 (1980) 12,.00, 20
United States v. *Baker*, 985 F.2d 1032 (10th Cir. 1993) 43-44
United States v. *Belt*, 516 F.2d 873 (8th Cir..0035e1F

United States v1999e1. Ba61Swo55 6 110f 3.11244 0 TD1980) 7 F.2d 609 (7thCir..0039) .....09 (7lj /.....46]TJ
538j /F6 97003 3d.5 0 TD (,6 516 F.2D198....(8th Cir..0035e1F)Tj -8 e8 Tf 0i.S. 2s4.Cir.)T9j-9.805 38. o41783 1w [(1999easich)Tj /F6 1 Tf 6.244 0

Cases—Continued: Page

United States v. *Lanier*, 520 U.S. 259 (1997) 35
United States v. *Lewis*, 628 F.2d 1276 (10th Cir. 1980), cert. denied, 450 U.S. 924 (1981) 22
United States v. *Mann*, 119 F. Supp. 406 (D.D.C. 1954) 21
United States v. *Moore*, 73 F.3d 666 (6th Cir.), 21

Constitution, statutes, and rules:	Page
U.S. Const. Amend. V	26
Act of Mar. 4, 1909, ch. 321, § 284, 35 Stat. 1144	35
Act of Sept. 26, 1918, ch. 177, § 5209, 40 Stat. 972	30
Act of May 18, 1934, ch. 304, § 2a, 48 Stat. 783	31
Act of Aug. 24, 1937, ch. 747, 50 Stat. 749	31
Act of July 3, 1946, ch. 537, § 1(b), 60 Stat. 420	15
Act of June 25, 1948, ch. 645, 62 Stat. 683	15, 32
Anti-Racketeering (Hobbs) Act, 18 U.S.C. 1951	6, 15
Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 98-473, Tit. II,	

Statutes and rules—Continued: Page

18 U.S.C. 2118(a) 6, 15
18 U.S.C. 2119 (Supp. IV 1998) 6, 15, 16, 23
18 U.S.C. 3559(a) 26
20 U.S.C. 1097(a) 10
21 U.S.C. 846 17
26 U.S.C. 5861(d) 19
26 U.S.C. 7201 9
26 U.S.C. 7207 9
Ala. Code § 13A-8-43 (1994) 17
Ark. Code Ann. § 5-12-102 (Michie 1997) 17
Conn. Gen. Stat. Ann. § 53a-133 (West 1994) 17
N.H. Rev. Stat. Ann. § 636:1 (1996) 17
Ohio Rev. Code Ann. § 2911.01(A)(1) (Anderson 1999) 25
Va. Code Ann. § 18.2-58 (Michie 1996) 19
Fed. R. Crim. P.:
Rule 7(a) 27
Rule 20 .....

Miscellaneous—Continued: Page

S. 2841, 73d Cong., 2d Sess. (1934) 31
1 L. Sand et al., *Modern Federal Jury Instructions* (1999) 43
3 L. Sand et al., *Modern Federal Jury Instructions* (1999) 13
U.S. Sentencing Guid9.3oes Manual (1998) 39
Webster's Third New International Dictionary (1986) 23, 24

In the name of the United States

18 U.S.C. 2113(a). He was sentenced to 215 months' imprisonment to be followed by three years' supervised release. The court of appeals affirmed. J.A. 80-87.[1]

1. On September 9, 1997, at approximately 2:00 p.m., petitioner entered the Collective Federal Savings Bank

C.A. Br. 3. The customer whom petitioner had pushed inside the bank upon his arrival meanwhile had run out

proved that petitioner had obtained the bank's money

See *Bates* v. *United States*, 522 U.S. 23, 29-30 (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.

A [illegible] EN
J. [illegible] A CE[illegible] J[illegible] N A [illegible] E INC[illegible] E[illegible]
FF E[illegible] E F [illegible] DE

Federal Rule of Criminal Procedure 31(c) provides thai a "defendant may be found guilty of an offense necessarily included in the offense charged." In *Schmuck* v. *United State*st

A. [illegible]

"[T]he language of the statutes that Congress enacts

lesser included offense of bank robbery because Section

“takes and carries away, with intent to steal or purloin,
Section 2113(b), by contrast, provides that anyone who
association,” is guilty of an offense that is punishable by
of, any bank, credit union, or any savings and loan
the care, custody, control, management, or possession
money or any other thing of value belonging to, or in

any property or money or any other thing of valueexceeding $1,000
control, management, or possession of any bank, creditSTw [-ciET0 y savings an

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.[7]

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. 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

---

[7] 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

(Supp. IV 1998).[8] 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 car-jacking statute, Senator Leahy noted in 1997 that

21 U.S.C. 846 was dispositive, notwithstanding that such proof was required for common law conspiracy).

c. State robbery statutes, like the various robbery offenses in Title 18, vary widely as to whether the specific intent to steal is an element of robbery. In most States, robbery has been defined by the state

permanently deprive the owner").[10] Thus, although the practice in the States does not directly shed light on what Congress intended in the drafting history of bank robbery in 18 U.S.C. 2113(a), Congress's omission of a specific intent element in the federal bank robbery offense was not unusual in light of similar omissions (and specific inclusions) by state legislatures that have

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. *United States*

cases are also consistent with the decisions of state courts, which, in construing robbery statutes that lack a specific mental element, have held that robbery is a general intent crime requiring proof that the defendant knew he was using force to take property from the person of another. See pp. 18-19, *supra*.

intent to steal. The bank robbery statute "describe[s] acts which, when performed, are so unambigtar3Ty dangerar3 to other3 that the requisite mental element is necessarily implicit in the description." *DeLeo*, 422 F.2d at 491. "It therefore is immaterial for seire d] a)
robbee is to stea3 that os whic thehais o claim fortoy

2113(a). Congress's decision to distinguish the offenses in Section 2113 thus is a reasonable basis for a judgment that the two crimes are different in nature and that the bank larceny offense is not simply a lesser degree of bank robbery.[14]

2. *Bank larceny, unlike bank robbery, requires p*

The Section 2113(a) and (b) offenses also have different *actus reus* requirements. Both offenses use the

United States v. *Moore*, 73 F.3d 666, 668-669 (6th Cir.) (using that definition to define "take" in the carjacking statute, 18 U.S.C. 2119 (Supp. IV 1998),

[14] Petitioner suggests that the "intent to steal or purloin" element from Section 2113(b) may be inferred in Section 2113(a) from the words "takes . . . *from* the person of another" (emphasis added) since the definition of steal is "to take the property

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), cert. denied, 517 U.S. 1228 (1996). Section 2113(b), however, *also* requires

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. Courts in States that have codified robbery offenses without a "carry away"

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*

exists for misdemeanors. See *Ex parte Wilson*, 114 U.S. 417, 429 (1885) (defining ,322infamous crime,323 in Fifth Amendment as one ,322punishable by imprisonment at hard labor in a * * * penitentiary,323). See generally Fed. R. Crim. P. 7(a); W. LaFave & J. Israel, *Criminal Procedure* § 15.1(a) at 616 (1985) (*Ex parte Wilson* definition ,322encompasses all federal felony offenses,323). Contrary to petitioner,325s citation ,(Br. 43-44), nowhere)Tj 0 -1.16 TD 0.019 Tc 0

Vhe vaistaatiompfereltion elemlue of rty offe[unl fe oken.

State practice supports that conclusion. Cf. *Jones*, 526 U.S. at 236 (discussing bodily injury factor in state robbery statutes). State statutes with similar language to the monetary valuation element in Section 2113(b) bank larceny have held that, because the valuation element must be proved in a larceny case, and because the prosecution need not prove a monetary value of the property taken to establish robbery, larceny is not a lesser included offense of robbery. *State* v. *Boucino*, 506 A.2d 125, 135 (Conn. 1986) (holding that "the crimes of robbery in the first degree and larceny in the first degree require proof of distinct elements * * * [because] [c]onviction for robbery in the first degree requires proof of varying degrees of force * * * [whereas] the state had to prove the value of the money taken from the bank in order to obtain a conviction on the charge of larceny in the first degree").[18]

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 V.I.* 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

(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

and theve vislats), th102Tj 4;); Bell

cer-s),

Bell

identical to the version presently codified in Section 2113(b) in all relevant respects.[19]

In 1948, Congress codified the criminal code. Act of

See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same language used by House Committee to

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) (1994 & Supp. IV 1998). 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,

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*, 519 U.S. at 497 (noting that "[d]ropping the materiality element from the three [bank offenses] could not, then, reasonably have been seen as making no change" and that "[t]hose who write revisers' notes have proven fallible before"); *United States* v. *Lanier*, 520 U.S. 259, 268 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

Lanier

U

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's purpose was to create 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, *id.* at 324-325. 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 jurisp1udence, the test is whether Congress intended to authorize *punishment* for the two crimes to be imposed cumulatively. If it so chooses, Congress can authorize cumulative punishment for a greater and lesser offense. Cf. *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981). Likewise, Congress can forbid cumulative punishment even where two crimes may not bear

the relation of greater and lesser offenses. See, *e.g.*,
Simpson v. *United States*1978) (finding(38)Tj --2.54 -68 0 TD 01002 Tc 1.02i0qcumu r

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, "there are unwitting acts which constitute conversions" in the civil tort context. 342 U.S. at 270. "Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions." *Ibid*.

As the Court reasoned, "It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions." 342 U.S. at 272. The Court noted that, even though the "1948 Revision was not intended to create new crimes but to recodify those then in existence," the offense of "'converts' does not appear in any of [18 U.S.C. 641's] predecessors." 342 U.S. at 269 n.28.

The Court's analysis in *Morissette* does not apply to the bank robbery statute for three reasons. First, the Court construed a common law word, "converts," and

avoiding criminalizing what otherwise would be “un-w i

3. Petitioner's reliance (Br. 15-16) on *Neder* v. *United States*, 527 U.S. 1 (1999), is also misplaced. In *Neder*, the Court held that materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343) and

combination of common-law and non-common-law terms to define the elements of the offense. Petitioner thus is forced to argue that common-law terms ("take") in Section 2113(a) incorporate other elements ("specific intent to steal") or that the additional elements found in bank larceny but not in robbery are unimportant. Second, unlike the federal fraud statutes, which omitted an express materiality element from their inception, Congress expressly deleted the "feloniously" element from the bank robbery statute in 1948. Congress' express elimination of the common law mental element from the statute demonstrates that Congress did not intend to restrict bank robbery to its common law mental element.

robbery offense." *Id.* at 32. 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 efforts in his own testimony to convince the jury that he had not used force or intimidation, see C.A. App. 180-189, the evidence showed that intimidation occurred.[29]

More importantly, as the district court properly concluded, no reasonable juror could find otherwise, as there was no evidence to suggest that the tellers

"by intimidation" within the meaning of Section 2113(a). 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.[30]

30

APPENDIX

(b) 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.

(c) 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.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) lenthis section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or

the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.