No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

MICHAEL TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____◆_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals For The Ninth Circuit

_____◆_____

PETITION FOR WRIT OF CERTIORARI

_____◆_____

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO*
Assistant Federal Defender
2300 Tulare Street, Suite 330
Fresno, California 93721
(559) 487-5561
Peggy_Sasso@fd.org
*Counsel of Record for Petitioner

QUESTION PRESENTED

Did, as the First, Fourth, Sixth, Ninth and Tenth Circuits seem to believe, this Court in *Carter v. United States*, 530 U.S. 255 (2000), add an additional layer of proof to 18 U.S.C. § 2113(a) such that the government must now prove beyond a reasonable doubt that not only did a defendant engage in conduct that a reasonable person would perceive as intimidating, but also that the defendant understood that his actions were objectively intimidating?

If this Court did not so hold and, as has historically been true, a conviction under § 2113(a) will be sustained even if the defendant was not aware his conduct would be perceived as intimidating by anyone, where the statutory definition of a crime of violence under 18 U.S.C. § 924(c)(3)(A) includes the language "against the person or property of another," can the Ninth Circuit's decision that § 2113(a) constitutes a crime of violence under § 924(c)(3)(A) be reconciled with this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) holding that where a definition of a crime of violence includes the narrowing language "against the person or property of another," to constitute a crime of violence a conviction must necessarily establish that the defendant was more than negligent with respect to whether his intentional use of force could harm another?

LIST OF PARTIES

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

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

A. Where the Ninth Circuit is now the Tenth Out of Ten Circuits to Treat the Limiting Language "Against the Person or Property of Another" as Mere Surplusage Contrary to This Court's Direction in *Leocal v. Ashcroft*, Clarification is Urgently Needed From This Court to Ensure that Sentencing Courts Are Not Being Improperly Stripped of Their Sentencing Discretion under 18 U.S.C. § 3553(a) and Individuals Are Not Needlessly Subjected to Decades in Custody Beyond Their Offense of Conviction 1

1. A Crime of Violence Categorically Establishes that a Defendant was More than Negligent with Respect to the Attendant Circumstance – Against the Person or Property of Another – When the Defendant Used or Threatened to Use Physical Force 1

2. To Secure a Conviction Under § 2113(a), Historically the Government Has Not Been Required to Prove Beyond a Reasonable Doubt that a Defendant Understood that His Conduct Could be Perceived as Intimidating by Another 14

TABLE OF CONTENTS (Cont'd)

Page

3. Where the Government Does Not Need to Prove that a Defendant Understood His Conduct Could be Perceived as Intimidating, the Government Does Not Need to Prove the Defendant Was Anything But Negligent Regarding Whether His Conduct Might Be Perceived By Another as a Threat of Physical Force 182

4. Five Circuits, Including the Ninth Circuit, Are Misreading This Court's Decision in *Carter v. United States* to Stand For the Proposition that the Government Must Prove Beyond a Reasonable Doubt that a Defendant *Understood* His Conduct Might Be Perceived as Intimidating by Another in Order to Secure a Conviction Under § 2113(a) 21

B. This Case Is an Excellent Vehicle for this Court to Provide Much Needed Clarification on (1) Whether Following *Carter v. United States*, a Conviction Under § 2113 Requires the Government to Establish that a Defendant Understood His Conduct Could Be Intimidating, and (2) If Not, Whether This Court's Reasoning in *Leocal v. Ashcroft* Still Applies to the Definition of a Crime of Violence that Includes the Limiting Language "Against the Person or Property of Another" 28

CONCLUSION 31

APPENDIX A: Memorandum of the United States Court of Appeals for the Ninth Circuit Court in *United States of America v. Michael Torres,* U.S.C.A. No. 17-15222 (December 5, 2018)..... A1 to A2

APPENDIX B: Memorandum Decision and Order of the United States District Court for the Eastern District of California Denying Petitioner's Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (January 31, 2017) ..... B1 to B10

APPENDIX C: Judgment of the United States District Court for the Eastern District of California (May 2, 2013) ..... C1 to C-7

TABLE OF AUTHORITIES

Page

CASES

Begay v. United States
553 U.S. 137 (2008) 5, 13, 14

Carter v. United States
530 U.S. 255 (2000) ..... *passim*

Elonis v. United States
135 S. Ct. 2001 (2015) 18, 19, 20

Flores v. Ashcroft
350 F.3d 666 (7th Cir. 2003) 18

In re Sams
830 F.3d 1234 (11th Cir. 2016) 9

Johnson v. United States
135 S. Ct. 2551 (2015) 5, 6

Leocal v. Ashcroft
543 U.S. 1 (2004) ..... *passim*

Moncrieffe v. Holder
569 U.S. 184 (2013) 7

Sessions v. Dimaya
138 S. Ct. 1204 (2018) 7

Staples v. United States
511 U.S. 600 (1994) 22

United States v. Arafat
789 F.3d 839 (8th Cir. 2015) 17

United States v. Armour
840 F.3d 904 (7th Cir. 2016) 16, 24

United States v. Bailey
444 U.S. 394 (1980) 20, 23

TABLE OF AUTHORITIES (Cont'd)

Page

United States v. Brewer
848 F.3d 711 (5th Cir. 2017) 9

United States v. Burnim
576 F.2d 236 (9th Cir. 1978) 14

United States v. Caldwell
292 F.3d 595 (8th Cir. 2002) 16

United States v. Campbell
865 F.3d 853 (7th Cir. 2017) 9

United States v. Castleman
134 S. Ct. 1405 (2014) 11

United States v. Cruz-Diaz
550 F.3d 169 (1st Cir. 2008) 17

United States v. Davis
No. 18-431 (S. Ct.) (pending) 7, 31

United States v. Deiter
890 F.3d 1203 (10th Cir. 2018) 9, 26, 27

United States v. Ellison
866 F.3d 32 (1st Cir. 2017) 9, 25, 26

United States v. Foppe
993 F.2d 1444 (9th Cir. 1993) 14, 24, 28

United States v. Garrett
3 F.3d 390 (11th Cir. 1993) 17

United States v. Hamman
3:16-cr-185 (D. Oregon 2017) 16

United States v. Harper
869 F.3d 624 (8th Cir. 2017) 9

TABLE OF AUTHORITIES (Cont'd)

Page

United States v. Hopkins
703 F.2d 1102 (9th Cir. 1983) 15, 25

United States v. Johnson
8:13-cr-190 (C.D. Cal. 2017) 16

United States v. Kelley
412 F.3d 1240 (11th Cir. 2005) 15

United States v. Lucas
963 F.2d 243 (9th Cir. 1992) 15

United States v. Martinez-Jimenez
864 F.2d 664 (9th Cir. 1989) 17

United States v. McBride
826 F.3d 293 (6th Cir. 2016) 9, 26, 27

United States v. McNeal
818 F.3d 141 (4th Cir. 2016) 9, 26

United States v. Medved
905 F.2d 935 (6th Cir. 1990) 17

United States v. Nash
946 F.2d 679 (9th Cir. 1991) 15

United States v. Selfa
918 F.2d 749 (9th Cir. 1990) 15, 28

United States v. Smith
544 F.3d 781 (7th Cir. 2008) 14

United States v. Watson
881 F.3d 782 (9th Cir. 2018)
cert. denied, 139 S. Ct. 203 (Oct. 1, 2018) ..... *passim*

United States v. Wilson
880 F.3d 80 (3d Cir. 2018) 9, 24

TABLE OF AUTHORITIES (Cont'd)

Page

United States v. Woods
576 F.3d 400 (7th Cir. 2009) 18

United States v. Yockel
320 F.3d 818 (8th Cir. 2003) 8, 23

Welch v. United States
136 S. Ct. 1257 (2016) 6

STATUTES

United States Code
18 U.S.C. §16 ..... 7, 10, 11, 12
18 U.S.C. § 365 14
18 U.S.C. § 875 19
18 U.S.C. § 924 ..... *passim*
18 U.S.C. § 2113 i
18 U.S.C. § 3553 ..... 5, 10, 13, 28, 30
28 U.S.C. § 1254 1
28 U.S.C. § 2255 ..... *passim*

OTHER AUTHORITIES

Supreme Court Rules
Rule 13.3 1

Model Penal Code § 2.02(d) 18

Ninth Circuit Model Jury Instructions § 8.162 17

Government's Answering Brief
United States v. Yockel, 2002 WL 32144417 (filed Nov. 18, 2002) 23

Petition for a Writ of Certiorari
Watson v. United States, No. 18-5022 (filed Jun. 25, 2018) 29

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Torres respectfully petitions this Court for a writ of certiorari to review the denial of his 28 U.S.C. § 2255 motion to vacate and correct his sentence by the United States Court of Appeals for the Ninth Circuit.

◆

OPINIONS BELOW

The December 5, 2018 memorandum denying Torres his 28 U.S.C. § 2255 motion to vacate and correct his sentence issued by the United States Court of Appeals for the Ninth Circuit is unpublished and reproduced in the appendix to this petition at A1-A2. The Ninth Circuit's denial rested solely on the Ninth Circuit's earlier decision, *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied* 139 S. Ct. 203 (2018). Appendix at A2. There was no request for a rehearing.

The January 31, 2017 memorandum decision and order of the United States District Court for the Eastern District of California denying Torres' motion to vacate and correct his sentence pursuant to 28 U.S.C. § 2255 is unpublished and reproduced in the appendix at B1-B10.

◆

JURISDICTION

The memorandum of the United States Court of Appeals for the Ninth Circuit denying Torres' 28 U.S.C. § 2255 motion was filed on December 5, 2018. Appendix at A1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

PROVISIONS OF LAW INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Under 18 U.S.C. § 924(c)(1)(A) any person who brandishes a firearm "during and in relation to any crime of violence or drug trafficking crime" is subject to an enhanced mandatory consecutive sentence. The portion of § 924(c) defining a "crime of violence" has two clauses, commonly referred to as the elements clause and the residual clause:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The federal armed bank robbery statute at 18 U.S.C. § 2113(a) and (d) reads as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

INTRODUCTION

Torres requests certiorari to bring internal consistency to federal circuit precedent interpreting the *mens rea* modifying the intimidation element of federal bank robbery under 28 U.S.C. § 2113(a) following this Court's decision in *Carter v. United States*, 530 U.S. 255 (2000), and, more importantly, to provide much needed clarification of this Court's reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) in which this Court explained that when the definition of a crime of violence includes the attendant circumstance – against the person or property of another – the dispositive issue is the *mens rea* that modifies that attendant circumstance.

Notwithstanding this Court's reasoning in *Leocal*, circuit courts across the country are routinely ignoring the *mens rea* that modifies the attendant circumstance "against the person or property of another" and instead improperly

focusing on the *mens rea* modifying the *actus reus*. *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018), upon which the Ninth Circuit exclusively relied in denying Torres' § 2255 motion, is a prime example. Where the issue presented here was not raised in Watson's petition for writ of certiorari, this case provides an excellent vehicle for this Court to provide the needed clarification in how to interpret the scope of a "crime of violence" that includes the attendant circumstance "against the person or property of another." This is particularly true where the element of "intimidation" in § 2113(a) has historically been satisfied by showing nothing more than that the defendant was negligent with respect to communicating a threat of physical force against the person or property of another, thereby placing the ten circuit courts holding that § 2113(a) constitutes a crime of violence under § 924(c)(3)(A), including the Ninth Circuit here, directly in conflict with this Court's reasoning and holding in *Leocal*.

This case presents a question of exceptional importance regarding federal criminal law that requires this Court's guidance. Either *Leocal* does not mean what it appears to say, which is that an offense that does not require proof that when a defendant used or threatened to use physical force he understood that his conduct could harm another is not a crime of violence when the definition of a crime of violence includes the limiting language "against the person or property of another," or else federal courts across the country are imposing extremely harsh sentencing enhancements under 18 U.S.C. §§ 924(c) and 924(e), as well as guideline enhancements, for offenses, including § 2113, that do not constitute crimes of

violence. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses that do not require proof that a defendant was anything but negligent with respect to whether his use or threatened use of force was *directed against the person or property of another*.

Where draconian sentencing enhancements are at stake under § 924, the predicate offenses that constitute "crimes of violence" or "violent felonies" should evince "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay v. United States*, 553 U.S. 137, 146 (2008), overruled on other grounds by *Johnson v. United States*, 135 S. Ct. 2551, 2558-59 (2015). As this Court observed, simply because a defendant intentionally engaged in conduct that put another in danger does not mean that the defendant is unequivocally such a menace to society that a judge must be stripped of his or her sentencing discretion under 18 U.S.C. § 3553(a). *Id*. And yet that is exactly what is happening as the lower courts run roughshod over this Court's decision in *Leocal*. Action from this Court is urgently needed.

STATEMENT OF THE CASE

On January 16, 2013, pursuant to a plea agreement Torres entered a guilty plea to four counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). On April 29, 2013, the district court entered a judgment

convicting Torres of four counts of 18 U.S.C. § 2113(a) and (d) and one count of 18 U.S.C. § 924(c)(1), and sentenced him to 96 months on each of the bank robbery counts to be served concurrently, and 84 months on the § 924(c) count to be served consecutively to the 96 months for a total of 180 months. Appendix at C2. Torres did not file an appeal.

On June 26, 2015 this Court issued *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"), which held that the residual clause of 18 U.S.C. § 924(e)(2)(B) defining a "crime of violence" in the context of the Armed Career Criminal Act was unconstitutionally vague. On June 22, 2016, Torres filed a motion in district court pursuant to 28 U.S.C. § 2255 to vacate and correct his sentence on the basis that following *Johnson II* his conviction for brandishing a firearm during and in relation to a crime of violence is unconstitutional and cannot stand.

Specifically, Torres argued that pursuant to the reasoning of *Johnson II*, the residual clause codified at 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague, and, because *Johnson II* announced a new substantive rule that applied to § 924(c) and was retroactive in cases on collateral review pursuant to *Welch v. United States*, 136 S. Ct. 1257, 1259 (2016), his § 2255, which was filed within one year of *Johnson II*, was timely under 28 U.S.C. § 2255(f)(3).

On the merits Torres argued that his conviction for violating § 2113(a) and (d) did not qualify as a crime of violence under § 924(c)(3)(A) – the elements clause – because § 2113 does not require proof that a defendant was anything but

negligent with respect to whether a reasonable person would construe his actions as a threat against them and thus § 2113 reaches more conduct than is covered by § 924(c)(3)(A). *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (an offense is categorically overbroad if the least of the acts criminalized are not encompassed under the relevant definition of a crime of violence). Torres argued that his conviction under § 924(c) could, therefore, only have been secured under § 924(c)(3)(B)'s residual clause, and thus, pursuant to the reasoning of *Johnson II*, his § 924(c) conviction was sustained in violation of his Fifth Amendment right to due process and must be vacated.[1]

On January 31, 2017, the district court issued a decision denying Torres' § 2255 motion on the merits on the basis that § 2113(a) is a crime of violence under the elements clause of § 924(c)(3)(A), but acknowledged that reasonable jurists could find the issue debatable and granted Torres a certificate of appealability. Appendix at B1-B10.

Torres filed a timely notice of appeal with the Ninth Circuit Court of Appeals on February 3, 2017. On December 5, 2018, the Ninth Circuit issued an

---

[1] In reaching the merits of Torres' motion, the Ninth Circuit did not address whether 18 U.S.C.§ 924(c)(3)(B) is constitutionally vague. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) this Court struck down the residual clause of 18 U.S.C. § 16(b), which is substantively identical to the residual clause of 18 U.S.C. § 924(c), as unconstitutionally vague. This Court will address whether § 924(c)(3)(B) is likewise unconstitutional in *United States v. Davis*, No. 18-431 (S. Ct.) (cert. granted Jan. 4, 2019). The government in this case did not challenge application of the categorical approach (the issue presented in *Davis*), and because the district court and the lower court decided this case on the grounds of the elements clause alone, that is the sole issue presented in this petition for certiorari. Accordingly, this Court should hold Torres' petition for resolution of *Davis*.

unpublished decision affirming the district court's denial of Torres' § 2255 motion on the merits. Appendix at A1-A2. Specifically, the Ninth Circuit held that Torres' argument that that § 2113 does not qualify as a crime of violence under § 924(c) was "foreclosed" by *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018) (holding that § 2113(a) is a crime of violence under the elements clause, the court did not address the residual clause). *Id*. at A2.

Torres requests certiorari to clarify that in *Carter v. United States* this Court did not add an additional layer of proof to the offense of 18 U.S.C. § 2113(a) requiring proof that the defendant understood his conduct could be perceived as intimidating to others, and thus the Ninth Circuit, along with nine other circuits, are improperly applying this Court's decision in *Leocal v. Ashcroft* to hold that § 2113(a) is categorically a crime of violence as that term is defined under § 924(c)(3)(A).

REASONS FOR GRANTING THE WRIT

The issue presented here is not whether the defendant is guilty of a serious crime that puts innocent people in harm's way, and it is not whether the defendant intentionally engaged in conduct that a reasonable person would construe as threatening, but whether a defendant's conviction for violating § 2113(a) necessarily establishes that he is someone who was more than negligent regarding whether his conduct would be construed as a threat of violent physical force *against another* such that it is appropriate to subject him to severe sentencing enhancements on top

of the already harsh sentence he has received for committing the underlying offense.[2] The answer to that question is clearly "no" under this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), yet the Ninth Circuit and every other circuit court to consider the issue is getting the answer wrong. *See, e.g.*, *United States v. Ellison*, 866 F.3d 32, 36–37 (1st Cir. 2017); *United States v. Wilson*, 880 F.3d 80, 84–85 (3d Cir. 2018); *United States v. McNeal*, 818 F.3d 141, 153–54 (4th Cir. 2016); *United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293, 295–96 (6th Cir. 2016); *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017); *United States v. Harper*, 869 F.3d 624, 625–27 (8th Cir. 2017); *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018); *United States v. Deiter*, 890 F.3d 1203, 1216 (10th Cir. 2018); *In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016).

[2] At the time Torres was convicted, a defendant convicted of two counts of violating § 924(c) in a single case was subject to at least a mandatory minimum of 30 years in custody consecutive to any other sentence that the court may impose, and for each § 924(c) conviction thereafter, he would be sentenced to at least an additional 25 years in custody. In other words, several § 924(c) convictions could quickly become the equivalent of a life sentence.

A. Where the Ninth Circuit is now the Tenth Out of Ten Circuits to Treat the Limiting Language "Against the Person or Property of Another" as Mere Surplusage Contrary to This Court's Direction in *Leocal v. Ashcroft*, Clarification is Urgently Needed From This Court to Ensure that Sentencing Courts Are Not Being Improperly Stripped of Their Sentencing Discretion under 18 U.S.C. § 3553(a) and Individuals Are Not Needlessly Subjected to Decades in Custody Beyond Their Offense of Conviction.

1. A Crime of Violence Categorically Establishes that a Defendant was More than Negligent with Respect to the Attendant Circumstance – Against the Person or Property of Another – When the Defendant Used or Threatened to Use Violent Physical Force.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court broke down the elements of 18 U.S.C. § 16(a), which are substantively identical to 18 U.S.C. § 924(c)(3)(A), and explained how to apply the concept of *mens rea* to said elements. *Leocal*, 543 U.S. at 7-9. In order to get the legal analysis called for in this case correct, it is critical to understand what this Court did in *Leocal* with respect to diagraming the constituent parts of the "elements" clause.

As this Court explained in *Leocal*, the fact that a defendant intentionally used (or threatened to use) violent physical force is not the dispositive issue in defining what constitutes a crime of violence under the definition set forth under § 16(a). The definition of a crime of violence under § 16(a), like the definition under § 924(c)(3)(A) here, contains a critical attendant circumstance – against the person or property of another. Accordingly, we look not to the fact that the defendant intentionally used force (or intentionally engaged in conduct that a reasonable person would perceive as threatening). Instead we ask whether when the defendant engaged in said conduct, did he act with more than negligence with respect to the

possibility that said conduct would result in harm to another or be perceived by a reasonable person as threatening harm. In other words, the dispositive element under § 16(a) and § 924(c)(3)(A) is "against the person or property of another," and specifically the defendant's intent with respect to the "'use . . . of physical force *against the person or property of another*.'" *Leocal*, 543 U.S. at 9 (emphasis in original).

Notably, both parties in *Leocal*, (as well as the Ninth Circuit here and circuit courts across the country), looked just to the fact that the defendant used (or threatened to use) force, and not to the defendant's awareness that said use of force might be directed at the person of another, or perceived to be threatening by the person of another. *Id*. at 9. This Court explained that where the definition included the language "against the person or property of another," the parties were wrong to look to the defendant's intentional use of force – what matters is the defendant's awareness that said intentional use of force might impact the person of another. *Id*.

Indeed, as this Court has subsequently explained, when the relevant statutory language simply requires proof of the use of force, that *can* be satisfied by the "knowing or intentional application of force," *United States v. Castleman*, 134 S. Ct. 1405, 1409, 1415 (2014), but the analysis is different when the narrowing language "against the person or property of another" is added. *Leocal*, 543 U.S. at 9. Accordingly, the "critical aspect" of the crime of violence defined under § 16(a) and § 924(c)(3)(A), in contrast to the definition at issue in *Castleman*, is that the predicate offense necessarily requires not only the intentional use of force but

"one involving the 'use . . . of physical force *against the person or property of another*.'" *Id.* (emphasis in original). And where the "key phrase in § 16(a) [is] – the 'use. . . of physical force against the person or property of another,'" a conviction for the predicate offense must necessarily establish that the defendant acted with "a higher degree of intent than negligen[ce]" with respect to the possibility that his conduct would harm another. *Id.*

This Court, therefore, concluded that Leocal's conviction for driving under the influence and causing serious bodily injury did not qualify as a crime of violence under § 16(a). *Id.* at 3-4. The state statute of conviction merely required proof that a defendant intentionally operated a vehicle and in so doing caused serious bodily injury to another. *Id.* at 7. The government was not required to prove that when the defendant intentionally engaged in conduct that involved the use of force against another (driving a vehicle while intoxicated) that he had any awareness that his intentional conduct could harm another. *Id.* Because the definition under § 16(a) included "against the person or property of another," even if the state statute had required proof that when the defendant engaged in the use of force that resulted in harm to another he had been negligent with respect to the possibility that someone might be harmed as a result of his conduct, that would not be sufficient to constitute a crime of violence under § 16(a). Section 16(a) requires more.

In other words § 16(a) is targeted at a narrower class of defendants who have a certain callousness towards others – those who, at the very least, perceive the risk

of harm to others but act anyway. *See, e.g.*, *Begay*, 553 U.S. at 145 (explaining that while a person may intentionally drink, and presumably, intentionally drive, DUI statutes do not require proof that a defendant "purpose[fully] or deliberate[ly] drove under the influence, and "this distinction matters considerably" where, under a recidivist sentencing statute, or in the case of the enhancement under § 924(c), the question is whether a defendant's convictions stand for the proposition that he possesses such a high degree of danger to others that a sentencing judge must be stripped of his/her discretion under 18 U.S.C. § 3553(a).

Accordingly, under the definition codified at § 924(c)(3)(A) – which imposes a 5 to 10 years mandatory consecutive sentence for the first conviction and an additional 25 years for each subsequent conviction – the issue is not whether the defendant intentionally used force, or intentionally engaged in conduct that might be perceived by others as a threat, but whether the offense of conviction required the government to prove beyond a reasonable doubt that when the defendant intentionally used force or engaged in conduct that could be perceived as threatening, he was more than merely negligent about the fact that his conduct could harm another or be perceived as threatening by another.

Were it otherwise, and courts, as they are doing now, simply looked to whether a defendant intentionally engaged in dangerous conduct without asking whether the defendant necessarily knew the harm he was exposing others to, then the "mandatory minimum sentence would apply to a host of crimes which, though dangerous" do not necessarily evince "the deliberate kind of behavior associated

with violent criminal use of firearms." *Begay*, 553 U.S. at 146-47 (citing, among other offenses, 18 U.S.C. § 365(a) which proscribes the tampering of consumer products under circumstances manifesting extreme indifference to the risk that by so doing one is placing another person in danger of death or bodily injury, as an offense that does not identify the type of person Congress meant to capture when defining a violent felony); *c.f.*, *United States v. Smith*, 544 F.3d 781, 785 (7th Cir. 2008) ("We must remember that the enhanced prison term under the ACCA [and § 924(c)] is imposed *in addition* to prison time that already has been served for the predicate felony convictions," and is reserved for "those offenders whose criminal history evidenced a high risk for recidivism and future violence") (emphasis in original).

2. To Secure a Conviction Under § 2113(a), Historically the Government Has Not Been Required to Prove Beyond a Reasonable Doubt that a Defendant Understood that His Conduct Could be Perceived as Intimidating by Another.

Just like this Court did in *Carter v. United States*, 530 U.S. 255, 269-70 (2000), in 1970 the Ninth Circuit held that the first paragraph of § 2113(a) was a general intent crime, and thus the government did not need to prove beyond a reasonable doubt that the defendant purposely threatened to harm anyone. *United States v. Burnim*, 576 F.2d 236, 237 (9th Cir. 1978). Because the first paragraph of 2113(a) is a general intent crime, the requisite *mens rea* is established by proof that the defendant took the property of another through conduct that can be characterized as intimidating, and thus, "[w]hether [the defendant] specifically intended to intimidate [the victim] is irrelevant." *United States v. Foppe*, 993 F.2d

1444, 1451 (9th Cir. 1993). In other words, the element of "intimidation" is established so long as the defendant willfully engaged in conduct "that would put an ordinary, reasonable person in fear of bodily harm," regardless of whether the defendant understood that his conduct would be perceived as intimidating by the ordinary person, let alone intended to intimidate anyone. *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990).

The Ninth Circuit, therefore, has held that a defendant can be convicted of bank robbery by intimidation where he does nothing more than calmly hand a note to a teller explaining that a bank robbery is in progress and politely requesting the teller to provide him with some money regardless of whether the bank robber was aware of the inherently intimidating nature of his conduct. *See, e.g.*, *United States v. Lucas*, 963 F.2d 243, 247-48 (9th Cir. 1992); *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991); *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983).

Indeed, even where the defendant does not interact with the teller at all but simply reaches over and/or jumps over the counter and removes the money himself, circuit courts have had no problem concluding that the element of "intimidation" was satisfied so long as the defendant's conduct could be perceived as intimidating to the tellers present regardless of the defendant's intent. *See, e.g.*, *United States v. Kelley*, 412 F.3d 1240, 1245-46 (11th Cir. 2005) (explaining that "intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts," and thus "[w]hether a particular act constitutes intimidation is viewed objectively . . . and a defendant can be

convicted under section 2113(a) even if he did not intend for an act to be intimidating") (internal quotations omitted); *United States v. Caldwell*, 292 F.3d 595, 597 (8th Cir. 2002) (holding that where the defendant did not say anything to the teller, nor make any intimidating gestures nor indicate in any way that he was armed, the element of intimidation was still satisfied because the act of slamming his hands on the counter as he leapt over it to walk by the teller and take the money from an unlocked drawer would make "any reasonable bank teller [feel] intimidated"). Accordingly, as the Seventh Circuit explained, the government's burden of proof to establish bank robbery by intimidation is "low;" all the government need establish is that a "bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force." *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016).

In other words, circuit courts sustaining convictions under 18 U.S.C. § 2113 have not been concerned with whether the defendant had the capacity to place himself in the teller's shoes and appreciate that his conduct would be perceived by others as intimidating. Not surprisingly, district courts are therefore instructing juries that all the government needs to prove in order to establish "intimidation" is that the defendant willfully took the money "in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Hamman*, 3:16-cr-185, Doc 96 at 9 (D. Oregon, Instructions Filed 1/24/17); *see, e.g.*, *United States v. Johnson*, 8:13-cr-190, Doc. 273 at 20 (C.D. Cal., Instructions Filed 1/20/17) (to establish "intimidation," the government needs to prove only that the defendant

"knowingly and deliberately did something . . . that would cause a reasonable person under those circumstances to be fearful of bodily injury").

The fact that Torres was convicted of violating § 2113(d) does not alter the relevant analysis. The *actus reus* of federal bank robbery does not change whether the violation is for subsection (a) or subsection (d) of the statute. In a subsection (d) bank robbery, the defendant merely satisfies the act of "intimidation" in a specific manner*, i.e.*, by carrying a dangerous weapon. § 2113(d). Critically, however, the government need not prove an added layer of *mens rea*. The government need not prove that the defendant intended to threaten the individuals in the bank with the weapon or even understood that his possession of said weapon would put others in fear of violent physical force. Indeed, as the Ninth Circuit Model Jury Instructions make clear, all the jury needs to find is that the defendant "made a display of force that *reasonably caused* [*name of victim*] *to fear bodily harm* by using a [specify dangerous weapon or device]." § 8.162 (emphasis added).

The enhanced penalties associated with subsection (d) do not arise from the defendant's intent, but from "the greater burdens that [the weapon] imposes upon victims and law enforcement officers," who witness it. *United States v. Martinez-Jimenez*, 864 F.2d 664, 666 (9th Cir. 1989) (holding that a toy gun can therefore qualify as a dangerous weapon under § 2113(d)); *accord United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990). Once again, the concern is the perception

of the victim, not the intent of the defendant who may, or may not, have understood his actions to communicate a threat; what the defendant intended with respect to the element at issue here – the threat – is irrelevant.

3. Where the Government Does Not Need to Prove that a Defendant Understood His Conduct Could be Perceived as Intimidating, the Government Does Not Need to Prove the Defendant Was Anything But Negligent Regarding Whether His Conduct Might Be Perceived By Another as a Threat of Physical Force.

Proving that a defendant knowingly did something that a reasonable person might perceive as intimidating is very different from proving the defendant knew he was intimidating anyone. Simply proving that a person's intentional conduct resulted in harm to another says nothing about whether the person was even aware that his conduct could result in harm to another. Accordingly, as the Seventh Circuit cautioned, where "[e]very crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome," *United States v. Woods*, 576 F.3d 400, 411 (7th Cir. 2009), it is a mistake to "equat[e] intent to cause injury. . . with any injury that happens to occur." *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003).

Indeed, as this Court has recently explained, when a criminal statute looks at the facts known to the defendant and asks "whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct," *i.e.*, would have recognized his conduct could be perceived as intimidating by the ordinary person, "[t]hat is a negligence standard." *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015); *see* Model Penal Code § 2.02(d)

(defining negligence as "considering . . . the circumstances known to [the defendant]," the defendant should have been "aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct").

In *Elonis* the defendant was charged with making a communication that contained a threat to injure another person in violation of 18 U.S.C. § 875(c). *Id*. at 2004. The government argued that where the defendant knew the content of his communication and a reasonable person would have interpreted the conversation as threatening, the defendant was more than merely negligent with respect to the communicated threat. *Id*. at 2011. Rejecting the government's argument, this Court held that in fact the government had articulated precisely the definition of criminal negligence. *Id*. Criminal negligence hinges not on facts that the defendant did not know, but on facts that he did know, and asks whether a reasonable person would have been aware of the harm. *Id*. In other words, where circuit courts across the country routinely sustain convictions under § 2113(a) so long as a reasonable person would have perceived the defendant's actions as intimidating regardless of whether the defendant recognized that his actions might intimidate, by definition the government is not required to prove beyond a reasonable doubt that a defendant acted with a greater *mens rea* than negligence with respect to the element of intimidation.

To recognize that a conviction under § 2113(a) requires nothing more than a showing of negligence with respect to the element of intimidation is not to say that § 2113 is a crime of negligence. Of course it isn't. Complex statutes, such as

§ 2113(a), have multiple material elements each of which may have a distinct *mens rea*. *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). The *mens rea* pertaining to the actual taking in § 2113(a) is different from the *mens rea* pertaining to intimidation.

Pursuant to *Leocal*, the *mens rea* that is dispositive where the statutory definition of a crime of violence includes the language "against the person or property of another," is the *mens rea* modifying that attendant circumstance, which in the context of § 2113(a) is the *mens rea* modifying the element of intimidation. Following *Elonis*, there is no ambiguity that where an individual has satisfied the element of intimidation on the basis of being aware of the facts that would lead a reasonable person to realize that his conduct would be perceived as intimidating regardless of whether the defendant was subjectively aware of the risk that others might be intimidated by his conduct, that "is a negligence standard." *Elonis*, 135 S. Ct. at 2011.

In sharp contrast, a statute such as 18 U.S.C. § 2119 limits its reach to only those individuals who "*with the intent to cause death or serious bodily harm* takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation." (emphasis added). To secure a conviction, the government must necessarily establish beyond a reasonable doubt that the defendant not only intentionally engaged in conduct that put others in harm's way, but the defendant knew that when he acted. Section 2113 is not so limited. The government is not

required to prove that when the defendant acted he was anything but negligent with respect to harming another.

And when the definition of a crime of violence includes the limiting language "against the person or property of another," and decades of an individual's life hangs in the balance, that distinction matters. Having liability under § 924(c)(3)(A) turn on whether an ordinary person would perceive the defendant's conduct as intimidating regardless of whether the defendant understood his conduct could be perceived as intimidating, is the very definition of negligence, and it is exactly what this Court held in *Leocal* is insufficient to constitute a crime of violence. *Leocal*, 543 U.S. at 9-11

4. Five Circuits, Including the Ninth Circuit, Are Misreading This Court's Decision in *Carter v. United States* to Stand For the Proposition that the Government Must Prove Beyond a Reasonable Doubt that a Defendant *Understood* His Conduct Might Be Perceived as Intimidating by Another in Order to Secure a Conviction Under § 2113(a).

In *Carter v. United States*, 530 U.S. 255, 267-68 (2000), this Court determined the *mens rea* that applies to a different element of § 2113 than the one at issue here. Specifically, this Court addressed whether § 2113 requires proof that the defendant had the specific intent to steal. The defendant argued that § 2113(b) was a lesser included offense of § 2113(a) because, among other reasons, subsection (a) required proof of the specific "intent to steal or purloin," just like subsection (b). *Id*. at 259, 262. This Court rejected that argument. *Id*. As the Court explained, because Congress had not specified any *mens rea* in subsection (a), it was required "to read into [the] statute only that *mens rea* which is necessary to separate

wrongful conduct from otherwise innocent conduct," *Id.* at 269 (internal quotations omitted), and thus the government was only required to prove the defendant knew he was stealing, not that he had the specific intent to steal.

This Court explained its reasoning by reference to *Staples v. United States*, 511 U.S. 600 (1994). *Id.* In *Staples* the statute at issue punished a failure to register guns that had certain characteristics and the issue was whether the defendant had to know his gun had the certain characteristics that made it subject to registration. *Staples*, 511 U.S. at 609. This Court held that the defendant had to know the *facts* about his gun that brought it within the scope of the statute. *Id.* at 605; 619. Proving that the defendant knew the facts that made his gun subject to registration is very different from proving that the defendant knew his gun was subject to registration.

Similarly, as this Court explained, in the context of bank robbery, it is sufficient to separate wrongful from innocent conduct so long as the defendant knows he is taking money that does not belong to him and knows the facts that qualify his conduct as "intimidation." Just like in *Staples*, so long as the defendant knows the facts that bring his conduct into the reach of the statute, whether the defendant appreciates that his conduct qualifies as the conduct proscribed by the law is irrelevant.

In other words, by holding that § 2113(a) is a general intent crime, *Carter* did no more than recognize that in order to secure a conviction the government simply needs to prove that the defendant knew the facts that brought his conduct into the

reach of the statute. *Carter*, 530 U.S. at 269-70 (explaining that requiring a defendant to know the facts that bring him within the reach of § 2113(a) protects "the hypothetical person who engages in forceful taking of money while sleepwalking"). Indeed, where the term "general intent" "may be used to encompass all forms of the mental state requirement," *Bailey*, 444 U.S. at 403, the fact that a defendant stands convicted of a "general intent" crime tells us nothing more than that the defendant knew the facts that should have alerted him that his conduct was proscribed by the statute.

In other words, this Court's decision in *Carter* is in complete harmony with the negligent *mens rea* circuit courts have historically associated with the element of intimidation in § 2113(a). Notably, following *Carter*, the government argued to the Eighth Circuit that the "*Carter* Court. . . clearly stated that the *mens rea* for the *actus reus* of bank robbery is satisfied by proof that defendant knew that he was physically taking the money – that he did not forcefully take the money while sleepwalking or some similar situation," and "[s]ince intimidation is determined under an objective standard, defendant's subjective intent is irrelevant." *United States v. Yockel*, Government's Answering Brief, 2002 WL 32144417, at 28-30 (8th Circuit). The Eight Circuit agreed, "reaffirm[ing] that the intimidation element of section 2113(a) is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts whether or not the defendant actually intended the intimidation." *United States v. Yockel*, 320 F.3d

818, 823 (8th Cir. 2003). In so holding the Eighth Circuit relied on the Ninth Circuit's decision in *United States v. Foppe*. *Id*. at 824.

Consistent with the Eighth Circuit, the Third Circuit has likewise reaffirmed that *Carter* did not add an additional layer of proof to secure a conviction under § 2113(a). *United States v. Wilson,* 880 F.3d 80, 87 (3d Cir. 2018). As the *Wilson* court explained, *Carter* merely "stands for the proposition that, because § 2113(a) is a statute requiring only general intent, it is enough for the government to prove that the defendant took knowing action to rob a bank." *Id*. In other words, the government has to prove that the defendant "kn[e]w he was taking money from a financial institution that was not simply giving it away," and the element of intimidation is established where the defendant's acts "would cause an ordinary bank teller to be intimidated and turn over money that the defendant knew he had no right to have." *Id*.

Similarly, subsequent to *Carter*, the Seventh Circuit reaffirmed that the element of intimidation is satisfied "if an ordinary person would reasonably feel threatened under the circumstances." *Burnley*, 533 F.3d at 903; *Williams*, 864 F.3d at 828 (same). Indeed, the Seventh Circuit has gone even further and held that all bank robberies in violation of § 2113 "inherently contains a threat of violent physical force" based simply on the fact that a "bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force." *Armour*, 840 F.3d at 909.

In other words, courts do not ask juries to put themselves in a bank robber's shoes and ask them to assess whether the bank robber understood that his acts would be perceived by others as intimidating even if he meant no harm to anyone. The bank robber ran afoul of the law when he made the decision to steal money from the bank, and thus it has historically been irrelevant whether the bank robber understood how his actions would be perceived by others. It has never been a defense to bank robbery for a defendant to say "I was just there to ask for some money, I meant no harm to anyone, I was very polite and I did not know anyone would feel threatened by me." *See, e.g.*, *Hopkins*, 703 F.2d at 1103 (holding that even though the bank robber had spoken "calmly, made no threats, and was clearly unarmed," the intimidation element was satisfied by the fact that the robbery demanded money to which he as not entitled).

Nevertheless, the First, Fourth, Sixth, Ninth and Tenth Circuits have latched on to this Court's definition of the *actus reus* of § 2113 as the "taking of property of another by force and violence or intimidation," to mean that when this Court was tasked with determining whether the specific intent to steal required in subsection (b) was likewise an implicit element of subsection (a), and determined that it was not and that all the government was required to prove was a general intent to steal, this Court upended decades of jurisprudence by adding an additional layer of proof to subsection (a) and now requires the government to also prove that a defendant actually knew his conduct would be perceived by others as intimidating. *United States v. Ellison*, 866 F.3d 32, 39 (1st Cir. 2017) (*Carter* "demands" proof that a

defendant at least have knowledge with respect to the element of intimidation); *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir. 2016) (following *Carter*, "the government must prove not only that the accused knowingly took property, but also that he knew that his actions were objectively intimidating"); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (following *Carter*, the government must now prove that a defendant "at least kn[e]w that his actions would create the impression in an ordinary person that resistance would be met by force"); *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) (following *Carter*, "the offense must at least involve the knowing use of intimidation"); and *United States v. Deiter*, 890 F.3d 1203, 1213 (10th Cir. 2018) (following *Carter*, a conviction under § 2113 requires that "the defendant must have at least known his actions were objectively intimidating").

That said, a close reading of the aforementioned cases suggests that the First, Fourth, Sixth, Ninth and Tenth Circuits may not really believe this Court now requires the government to prove beyond a reasonable doubt that a defendant *understood* his actions might be perceived as intimidating by others in order to sustain a conviction under § 2113, but are instead using this Court's description of the *actus reus* of § 2113 for the limited purpose of concluding that § 2113(a) qualifies as a crime of violence. *See, e.g.*, *Ellison*, 866 F.3d at 37 (explaining that intimidation is established by "action by the defendant that would, as an objective matter, cause a fear of bodily harm"); *McNeal*, 818 F.3d at 155 (clarifying that "the intimidation element of § 2113(a) is satisfied if an ordinary person in the teller's

position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation"); *McBride*, 826 F.3d 293, 296 ("Intimidation concerns whether an ordinary person would feel threatened under the circumstances"); *Watson*, 881 F.3d at 785 (intimidation "requires that the defendant take property in such a way that would put an ordinary, reasonable person in fear of bodily harm") (internal quotations omitted); and *Deiter*, 890 F.3d at 1213 ("Every definition of intimidation requires a purposeful act that instills objectively reasonable fear (or expectation) of force or bodily injury") (internal quotations omitted).

If the *Carter* court really did change the definition of the elements necessary to sustain a § 2113(a) conviction to require proof beyond a reasonable doubt that not only did a defendant know the facts about his conduct that a reasonable person would have recognized as intimidating, but the defendant actually had the capacity to understand that his conduct could be perceived by others as intimidating, this Court, in dicta, radically transformed the law surrounding federal bank robbery, and given the high propensity of mentally ill individuals who commit bank robbery, made it extremely difficult for the government to secure a conviction under § 2113(a). Commonsense says that is not what this Court did when it held that § 2113(b) is not a lesser included offense of § 2113(a) on the basis that § 2113(b) requires a specific intent to steal or purloin and § 2113(a) does not.

From a public policy perspective it makes sense that liability for bank robbery turns on whether a reasonable person would have been intimidated by the defendant's intentional use of force irrespective of whether the defendant understood his conduct could intimidate anyone. What does not make sense, as this Court held in *Leocal*, is to use said conviction as a proxy for identifying the narrow class of defendants who have such a callous disregard for their fellow humanity that they would knowingly place another in danger of violent physical force such that the statutory penalties associated with the underlying offense are insufficient to protect the public from the danger presented by the defendant and sentencing judges must be categorically stripped of their sentencing discretion under 18 U.S.C. § 3553(a).

Where a conviction under § 2113(a) requires the government to prove only that the defendant took property from a bank with knowledge of facts that would lead an ordinary person to believe that resistance would be met by force, and whether the defendant knowingly intimidated anyone is irrelevant, *Selfa*, 918 F.2d at 751, *Foppe*, 993 F.2d at 1451, section 2113(a) cannot qualify as a crime of violence under § 924(c)(3)(A).

B. This Case Is an Excellent Vehicle for this Court to Provide Much Needed Clarification on (1) Whether Following *Carter v. United States*, a Conviction Under § 2113 Requires the Government to Establish that a Defendant Understood His Conduct Could Be Intimidating, and (2) If Not, Whether This Court's Reasoning in *Leocal v. Ashcroft* Still Applies to the Definition of a Crime of Violence that Includes the Limiting Language "Against the Person or Property of Another."

The issues are squarely presented here, and were not before this Court in *Watson v. United States*, *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018). Torres made the

same argument that he does here in his briefing at the Ninth Circuit: given that 18 U.S.C. § 924(c)(3)(A) contains the same limiting language – "against the person or property of another" – that this Court considered dispositive to its holding in *Leocal v. Ashcroft* mandating that a predicate offense must necessarily establish that a defendant was more than negligent about whether his intentional conduct could result in the harm against another, and given that a conviction under § 2113(a) and (d) does not require proof that a defendant was aware that others might find his conduct intimating, a conviction under § 2113(a) and (d) sweeps too broadly to constitute a crime of violence as defined under § 924(c)(3)(A).

The briefing at the Ninth Circuit was completed in this case when Torres filed his reply brief on December 18, 2017. The Ninth Circuit subsequently issued its decision in *United States v. Watson* on February 1, 2018, and this Court denied Watson's petition for certiorari on October 1, 2018. The Ninth Circuit then denied Torres § 2255 motion in an unpublished disposition that simply held that Torres' contention that § 2113 (a) and (d) does not qualify as crime of violence under § 924(c) was "foreclosed" by *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert denied*, 139 S. Ct. 203 (2018). Appendix at A2.

The petition for certiorari that was filed in *Watson*, which this Court denied, never discussed *mens rea* or the significance of the limiting language "against the person or property of another" as elucidated by this Court in *Leocal v. Ashcroft*, and never even mentioned this Court's decision in *Carter v. United States*. Petition for a Writ of Certiorari, *Watson v. United States*, No. 18-5022 (filed Jun. 25, 2018). The

only issue presented in the *Watson* petition was whether a conviction under § 2113 necessarily established that the requisite degree of force was used. *Id*.

In other words, this Court has not considered the *mens rea* argument made here, which was fully briefed in this case below, and which the Ninth Circuit did reach in *Watson* and then relied upon to deny Torres § 2255 motion. And in denying the *mens rea* argument raised in *Watson*, the Ninth Circuit relied on a misreading of this Court's decision in *Carter v. United States* to conclude that a defendant may not be convicted under § 2113 unless the government proves beyond a reasonable doubt that when the defendant robbed the bank he knowingly used intimidation. *Watson*, 881 F.3d at 785.

It is difficult to image a cleaner vehicle in which to address the critical and timely issues presented here, which reach beyond § 924(c)(3)(A) to any definition of a crime of violence that includes the limiting language "against the person or property of another." It is no secret that the circuit courts are inundated with crime of violence litigation, but if courts were following this Court's reasoning in *Leocal*, that should not be the case. There simply are not that many offenses that satisfy the requirements this Court set forth in *Leocal*, nor should there be when we are talking about stripping judges of their sentencing discretion under 18 U.S.C § 3553(a) and categorically adding what can amount to decades of additional prison time to a defendant's sentence for the underlying offense. As the analysis in this case should make clear, all of the circuit courts have strayed far away from this Court's guidance in *Leocal* and clarification from this Court is desperately needed.

CONCLUSION

This Court should hold Torres' Petition pending resolution of *United States v. Davis*, No. 18-431. If this Court confirms in *Davis* that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, Torres respectfully requests that this Court grant his petition for writ of certiorari, vacate the Ninth Circuit's decision and summarily remand this matter to the Ninth Circuit with directions to grant the § 2255 motion.

Dated: March 1, 2019

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO
Assistant Federal Defender
Eastern District of California
Counsel of Record for Petitioner
2300 Tulare Street, Suite 330
Fresno, CA 93721
(559) 487-5561
peggy_sasso@fd.org