NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

COREY KIDD,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

I. Did the court below err in finding that the offense of aiding and abetting robbery of controlled substances qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A)?

A. Robbery of controlled substances does not necessarily involve the use, attempted use, or threatened use of physical force against the person or property of another.

B. Aiding and abetting on offense does not necessarily involve the use, attempted use, or threatened use of physical force against the person or property of another.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On July 3, 2019, the court of appeals entered its opinion and judgment affirming the district court's finding that Corey Kidd's conviction for aiding and abetting armed robbery of controlled substances in violation of 18 U.S.C. §§ 2, 2118(a), and 2118(c)(1) was a crime of violence under the force clause definition of 18 U.S.C. § 924(c)(3)(A). *United States v. Kidd*, 929 F.3d 578 (8th Cir. 2019). A copy of the opinion is attached at Appendix ("App.") A.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2019. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

18 U.S.C. § 924(c)(3) provides in relevant part:

> ***
> (3) For the 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.

.

18 U.S.C. § 2118(a) provides in relevant part:

> Whoever takes or attempts to take from the person or presence of another by force or violence or by intimidation any material or compound containing any quantity of a controlled substance belonging to or in the care, custody, control, or possession of a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822) shall, except as provided in subsection (c), be fined under this title or imprisoned not more than twenty years, or both, if (1) the replacement cost of the material or compound to the registrant was not less than $500, (2) the person who engaged in such taking or attempted such taking traveled in interstate or foreign commerce or used any facility in interstate or foreign commerce to facilitate such taking or attempt, or (3) another person was killed or suffered significant bodily injury as a result of such taking or attempt.

18 U.S.C. § 2 provides in relevant part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

STATEMENT OF THE CASE

1. Corey Kidd pleaded guilty to aiding and abetting armed robbery of controlled substances in violation of 18 U.S.C. §§ 2, 2118(a), and 2118(c)(1) and to aiding and abetting the use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A). On July 27, 2012, he was sentenced to 155 months in prison, consisting of 71 months for armed robbery and 84 months for use of a firearm, to be served consecutively.

2. After this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Kidd filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 on June 22, 2016. In his motion, Mr. Kidd argued that the portion of the definition of "crime of violence" found at 18 U.S.C. § 924(c)(3)(B) is substantially similar to the residual clause of the Armed Career Criminal Act (the "ACCA") found at 18 U.S.C. § 924(e)(2)(B)(ii) and that it was also unconstitutionally vague in light of *Johnson*. He argued that his § 924(c) conviction was predicated upon an offense (namely, aiding and abetting the armed robbery of controlled substances) that only qualified as a "crime of violence" under the unconstitutionally vague portion of the definition, and that this conviction should accordingly be vacated.

3. On May 23, 2018, United States District Judge Susan O. Hickey, entered an order and judgment denying and dismissing Mr. Kidd's motion with prejudice. However, the court noted that the question of whether § 924(c)(3)(B) is unconstitutionally vague is debatable and issued a certificate of appealability.

4. Mr. Kidd appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2255(d). Mr. Kidd argued that the "risk-of-force" portion of § 924(c)'s definition of "crime of violence" was unconstitutionally vague in light of this Court's decisions in *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Court clarified that its *Johnson* decision rested only on the two factors expressly identified therein—"an ordinary-case requirement and an ill-defined risk threshold," *see Dimaya*, 138 S. Ct. at 1223—and found both of these factors to be present in 18 U.S.C. § 16(b). Mr. Kidd argued that both of these factors were also present in § 924(c)(3)(B), and that it was likewise unconstitutionally vague. Mr. Kidd further argued that his § 924(c) conviction should be vacated because the predicate offense upon which it was based, aiding and abetting robbery of controlled substances, could only qualify as a "crime of violence" under § 924(c)(3)(B) rather than under the "force clause" of § 924(c)(3)(A). Mr. Kidd pointed out that this offense could be committed via the element of intimidation, and that a defendant could be convicted of aiding and abetting robbery even if he acts negligently in such a way that is objectively intimidating, or if he acts in such a way that he communicates a threat of employing less-than-violent force. While Mr. Kidd's petition was on appeal, this Court found § 924(c)(3)(B) to be unconstitutionally vague based on the reasoning of *Johnson* and *Dimaya*. *See United States v. Davis*, 139 S. Ct. 2319 (2019).

5. The Eighth Circuit upheld Mr. Kidd's conviction "[b]ecause the residual clause definition does not apply in this case." *Kidd*, 929 F.3d at 580; App. A. The

court went on to conclude that, the "relevant portion of the robbery statute proscribes taking or attempting to take controlled substances from the person or presence of another by 'force or violence or by intimidation.'" *Id.* (citing 18 U.S.C. § 2118(a)). The court determined that intimidation has the threat of force, and therefore it categorically qualifies as a crime of violence under the force clause of § 924(c)(3)(A). *Id.* (internal citation omitted). The court concluded that intimidation requires the threat of physical force because a "threat, as commonly defined, speaks to what the statement conveys—not to the mental state of the author." *Id.* at 581 (citing *Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019)).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve the important issue of whether aiding and abetting robbery of controlled substances qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A).

A. Robbery of controlled substances does not necessarily involve the use, attempted use, or threatened use of physical force against the person or property of another.

Mr. Kidd was charged with aiding and abetting armed robbery of controlled substances in violation of § 2118(a) and aiding and abetting the use of a firearm in furtherance of a crime of violence in violation of § 924(c). The robbery offense served as the predicate "crime of violence" that supported Mr. Kidd's conviction for violation of § 924(c). As Mr. Kidd argued below, robbery of a controlled substance is not a "crime of violence" under the "force clause" of § 924(c)(3)(A) and can only have qualified as a "crime of violence" under § 924(c)(3)(B). Because § 924(c)(3)(B) is now unconstitutional in light of *Davis*, this conviction cannot stand.

In its opinion below, the Eighth Circuit held that the offense of aiding and abetting robbery of controlled substances under 18 U.S.C. § 2113(a) qualifies as a "crime of violence" under the force clause of § 924(c)(3)(A). This offense can be committed via intimidation. Intimidation does not require the threat of *violent physical force* against persons or property, and does not require an *intentional* threat of the same. Intimidation is defined in light of a similar robbery statute under § 2113, which is analogous to § 2118. "[B]ecause Congress indicated that the pharmacy burglary statute was modeled after the federal bank robbery statute, 18 U.S.C. § 2113, *see* H.R.Rep. No. 644, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984

U.S.C.C.A.N. 521, 524, [courts] look to interpretations of that statute for guidance." *United States v. Mills*, 1 F.3d 414, 419 (6th Cir. 1993).

It is well settled that intimidation under the analogous federal bank robbery statute occurs when "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996); *see also United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (adopting the same definition and quoting *Woodrup*); *United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010) (same, but citing *Yockel*). Applying this definition of intimidation, even assuming that the act of placing another in fear of bodily harm constitutes a threat of physical injury, the offense still fails to qualify as a "crime of violence" under the § 924(c)(3)(A) force clause because it does not require the use or threatened use of violent physical force against another. This fact has been recognized by many courts of appeal. *See United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (holding that the offense of making a criminal threat is not a crime of violence under the Guidelines); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 193-95 (2nd Cir. 2003) (holding that a conviction under a Connecticut statute requiring proof "that the defendant had intentionally caused physical injury" was not a crime of violence because causation of an injury does not necessarily involve the use of physical force); *United States v. Perez-Vargas*, 414 F.3d 1282, 1286-87 (10th Cir. 2005) (recognizing that injury can be caused without use of physical force "by guile, deception, or even deliberate omission" and that a conviction under an assault statute therefore does not categorically qualify as a crime of violence).

Case law indicates that defendants may be convicted of robbery based on negligent actions that are found to be objectively intimidating. For example, in *United States v. Smith*, 973 F.2d 603 (8th Cir. 1992), the defendant argued that his actions "were neither forceful, purposeful, nor aggressive." *Id.* at 604. He asserted that he "simply asked the tellers for money, and because of bank policy that tellers comply with all demands for money, the Norwest tellers simply gave [him] the money." *Id.* In finding that the evidence was sufficient to support the intimidation element, the court focused on testimony from the bank teller that the defendant was acting "very edgy and nervous," and that he was wearing a fanny pack that the teller feared might contain a weapon. *Id.* at 604-05. A defendant with a sincere belief that bank policy will be sufficient to overcome a teller's reluctance to hand over money, and who therefore sees no need to actively employ any intimidating measures, may nevertheless be found to have acted in an objectively intimidating manner based only upon his demeanor and his choice of accessories.

In *Yockel*, the Eighth Circuit recognized that "whether or not [the defendant] intended to intimidate the teller is irrelevant in determining his guilt." *Id.* Although this Court has held that a general intent *mens rea* must be read into the bank robbery statute, *see Carter v. United States*, 530 U.S. 255, 268-69 (2000), the Eighth Circuit concluded that "the *mens rea* element of bank robbery d[oes] not apply to the element of intimidation . . . ." *Yockel*, 320 F.3d at 824.[1] One of the factors relied upon by the

[1] Some other circuits have interpreted *Carter* to require proof that a bank robbery defendant "knew that his actions were objectively intimidating." *See United States*

court in *Yockel* to support the intimidation element was the defendant's appearance—"Yockel appeared dirty and had unkempt hair, and eyes that were blackened, as if he had been beaten." 320 F.3d at 824.

In *United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (unpublished table opinion), the court affirmed a finding of intimidation when the defendant reached over the counter and took money from the teller's open drawer after asking for change for a dollar, and then pulled away when the teller grabbed his arm and tried to close her drawer, accidentally hitting her in the mouth while doing so. *Id.* at *1. In yet other cases, intimidation was found based in part on the defendant's proximity to the bank teller. *See United States v. Kelley*, 412 F.3d 1240, 1245 (11th Cir. 2005) (defendant jumped onto the counter at a vacant teller station and grabbed handfuls of cash while "within arm's length" of another teller); *United States v. Caldwell*, 292 F.3d 595, 596 (8th Cir. 2002) (defendant jumped over the counter, made eye contact with a teller, and "approached to within one to two feet of her" before turning and going around a counter to an adjacent teller station; the defendant said nothing to the teller, did not gesture at her in any way, and made no indication that he had a weapon). Accordingly, simply getting too close to a person can support an objective finding of intimidation. To use an example noted by the Court in *Leocal*, "stumbling and falling into" someone would not be considered a use of physical force against the person of another (*see* 543 U.S. at 9); however, a robber of controlled substances who

v. Wilson, 880 F.3d 80, 87 (3d Cir. 2018) (quoting *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir. 2016)). The Eighth Circuit has not followed this approach.

stumbled and fell into a pharmacist—or even just near one—could surely be viewed as objectively intimidating from the pharmacist's vantage point. Because of the objective standard applied to the intimidation element, and the complete lack of any *mens rea* associated with that element, it is readily apparent that a defendant in the Eighth Circuit may be convicted of this offense despite only accidentally or negligently intimidating a reasonable person.

This Court has clearly held that a standard based upon the objective perspective of an ordinary, reasonable person is a negligence standard. *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). In *Elonis*, the defendant was convicted under 18 U.S.C. § 875(c), the federal statute prohibiting interstate threats to injure the person of another, based on certain posts he made to the social media site Facebook. He was convicted "under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat." *Id.* at 2004. This Court noted that "[h]aving liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—reduces culpability . . . to negligence . . . ." *Id.* at 2011 (internal quotations and citation omitted). Even if it must be shown that the defendant knew the "contents and context of his posts" in order to convict, the Court concluded, such a test would still be only "a negligence standard." *Id.*

A defendant may be convicted of robbery by intimidation even if he negligently acts in an intimidating manner. The Eighth Circuit did not take issue with Mr. Kidd's argument that the intimidation element of robbery can be satisfied through a

defendant's negligent actions; it merely concluded that a defendant's intent regarding the intimidation element was not relevant to the question of whether such an offense would qualify as a "crime of violence" under § 924(c)(3)(A).

Mr. Kidd contends that this places the Eighth Circuit at odds with this Court's precedent concerning what it takes to qualify as a "crime of violence" under a statutory force clause. This Court has held that, for an offense to qualify as a "crime of violence" under the force clause of 18 U.S.C. § 16(a) (which is essentially identical to § 924(c)(3)(A)), "the 'active employment' of physical force must be an element of the offense." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). "Because § 16(a) requires the 'use' of force, it 'most naturally suggests a higher degree of intent than negligent or merely accidental conduct,' and it is 'much less natural to say that a person actively employs physical force against another by accident.'" *United States v. Torres-Villalobos*, 487 F.3d 607, 615 (8th Cir. 2007) (quoting *Leocal*, 543 U.S. at 9). Mr. Kidd maintains that if a defendant's negligent actions cannot qualify as the "use" of physical force against the person or property of another, his negligent actions likewise cannot qualify as the communication of a threat of physical force against the person or property of another under § 924(c)(3)(A). As this Court remarked in *Leocal* when construing § 16, "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" 543 U.S. at 11. Interpreting such a term "to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.*

The rationale of *Leocal* applies to both offenses involving the use of force as well as offenses involving the *threat* of use of force. As a preliminary matter, the reasoning of *Leocal* has not been limited to the § 16(a) context. For example, in *United States v. Benally*, 843 F.3d 350 (9th Cir. 2016), the Ninth Circuit, based on the reasoning of *Leocal*, found that involuntary manslaughter under 18 U.S.C. §§ 1112 and 1153 does not qualify as a "crime of violence" under § 924(c)(3)(A) because it can be committed with a mental state of gross negligence. And the reasoning of *Leocal* was also applied in determining that an offense that could be committed with a *mens rea* of recklessness does not qualify as a "crime of violence" under U.S.S.G. § 2L1.2. *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010). Courts have also considered arguments based on *Leocal* that certain offenses do not qualify as "violent felonies" under the ACCA based on the lack of an appropriate *mens rea*. *See, e.g.*, *United States v. Burns-Johnson*, 864 F.3d 313, 318-19 (4th Cir. 2017). It is well settled that the similar language shared by the various "crime of violence" and "violent felony" definitions among the federal statutes and sentencing guidelines is interpreted similarly by the courts. *See, e.g.*, *Stuckey v. United States*, 878 F.3d 62, 68 n.9 (2d Cir. 2017).

In the instant case, the Eighth Circuit found Mr. Kidd's arguments on this issue to be foreclosed by the reasoning of *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017). *Kidd*, 929 F.3d at 581. In *Harper*, the court explained that, although bank robbery by intimidation does not require specific intent to intimidate, it still constitutes a threat of physical force because "'threat,' as commonly defined, 'speaks

to what the statement conveys—not to the mental state of the author.'" *Harper*, 869 F.3d at 626 (quoting *Elonis*, 135 S. Ct. at 2008). "Thus, if the government establishes that a defendant committed bank robbery by intimidation, it follows that the defendant threatened a use of force causing bodily harm." *Kidd*, 929 F.3d at 581 (citing *Estell*, 924 F.3d at 1293). The court did not actually address Mr. Kidd's assertion that a higher mental state than negligence must accompany the element of intimidation in order for the offense to qualify as a crime of violence. Instead, it simply disregarded this argument. The court concluded that robbery of controlled substances qualifies as a crime of violence under § 924(c)(3)(A) because it necessarily involves a threat of bodily harm, without giving any consideration to whether *Leocal* requires that a threat be communicated with a mental state greater than negligence. If a volitional act is required to constitute the use of physical force under *Leocal*, a volitional act should likewise be required to constitute a threat of physical force for purposes of determining whether an offense meets the definition of a "crime of violence." In the Eighth Circuit—contrary to *Leocal*—this is clearly not the case; the mental state with which a threat is communicated is irrelevant. Mr. Kidd urges this Court to grant review in this case to clarify this important point of law.

B. Aiding and abetting an offense does not necessarily involve the use, attempted use, or threatened use of physical force against the person or property of another.

Because this offense does not qualify as a crime of violence under the force clause of § 924(c)(3)(A), the offense of aiding and abetting robbery also fails to qualify as a crime of violence under the force clause. Even if armed robbery of controlled

substances is considered a crime of violence, Mr. Kidd contends that aiding and abetting armed robbery cannot be. The federal aiding and abetting statute, 18 U.S.C. § 2, provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Courts of appeal have determined that aiding and abetting presents an alternative charge that permits one to be found guilty as a principal, and therefore a conviction for aiding and abetting robbery qualifies as a crime of violence. *See e.g.*, *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018) ("18 U.S.C. § 2 . . . makes an aider and abettor 'punishable as a principal,' and thus no different for purposes of the categorical approach than one who commits the substantive offense.").

"As almost every court of appeals has held, '[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense.'" *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) (quoting *United States v. Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987)). The language used by Congress in proscribing aiding and abetting "comprehends all assistance rendered by words, acts, encouragement, support, or presence." *Id.* (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993)). It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Kidd's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to

meet the "elements clause" definition. Accordingly, a defendant can be convicted of aiding and abetting federal armed robbery of a controlled substance merely by encouraging or supporting another with regard to one element of the offense. It certainly cannot be said, then, that this offense necessarily involves as an element the use, attempted use, or threatened use of physical force.

CONCLUSION

For all of the foregoing reasons, Petitioner Corey Kidd respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 26th day of September, 2019.

Respectfully submitted,

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