NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK ESTELL,
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

Can a criminal offense that involves as an element an unintentionally or negligently communicated threat of bodily harm qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)?

LIST OF PARTIES

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

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Derrick Estell, No. 6:13-cr-60051, U.S. District Court for the Western District of Arkansas. Judgment entered March 23, 2015.

United States v. Derrick Estell, No. 15-1699, U.S. Court of Appeals for the Eighth Circuit. Judgment entered November 20, 2015.

Derrick Estell v. United States, No. 6:16-cv-06057, U.S. District Court for the Western District of Arkansas. Judgment entered May 23, 2018.

Derrick Estell v. United States, No. 18-2550, U.S. Court of Appeals for the Eighth Circuit. Judgment entered June 4, 2019.

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OPINION BELOW

On June 4, 2019, the court of appeals entered its opinion and judgment affirming the judgment of the district court denying Derrick Estell's motion to vacate under 28 U.S.C. § 2255. *Estell v. United States*, 924 F.3d 1291 (8th Cir. 2019). A copy of the opinion is attached in the Appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 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:

> 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 . . . .

18 U.S.C. § 2113(a) provides, in relevant part:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2119 provides, in relevant part:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both . . . .

STATEMENT OF THE CASE

1. Derrick Estell was named in a five-count superseding indictment and forfeiture allegation filed in the Western District of Arkansas on October 30, 2013. Mr. Estell was charged in Count One with bank robbery in violation of 18 U.S.C. § 2113(a); in Count Two with carrying and brandishing a firearm in furtherance of the "crime of violence" of bank robbery as charged in Count One in violation of 18 U.S.C. § 924(c)(1)(A)(ii); in Count Three with carjacking in violation of 18 U.S.C. § 2119(1); in Count Four with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and in Count Five with carrying and brandishing a firearm in furtherance of the "crime of violence" of carjacking as charged in Count Three in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

2. On December 1, 2014, Mr. Estell pleaded guilty to Counts Two and Five of the superseding indictment. On March 19, 2015, Estell was sentenced to a total of 384 months imprisonment, consisting of 84 months on Count Two and 300 months on Count Five to be served consecutively. Counts One, Three, and Four of the superseding indictment were dismissed on motion of the Government. Estell

appealed to the Eighth Circuit Court of Appeals, and the district court's judgment was affirmed.

3. On June 13, 2016, Mr. Estell filed a motion to vacate under 28 U.S.C. § 2255. The district court, as the sentencing court, had jurisdiction pursuant to § 2255. In this motion, Estell challenged his § 924(c) convictions on the basis that a portion of that statute was unconstitutionally vague in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). More specifically, it was argued that the portion of the definition of "crime of violence" found at § 924(c)(3)(B) is similar enough to the residual clause of the Armed Career Criminal Act (the "ACCA") found at 18 U.S.C. § 924(e)(2)(B)(ii) that it was also unconstitutionally vague in light of *Johnson*. Estell went on to argue that his § 924(c) convictions were predicated upon offenses (namely, bank robbery under 18 U.S.C. § 2113(a) and carjacking under 18 U.S.C. § 2119(1)) that only qualified as "crimes of violence" under the unconstitutionally vague portion of the definition, and that these convictions should accordingly be vacated.

4. On May 23, 2018, the district court entered its order adopting in part the magistrate's report and recommendation and denying Mr. Estell's § 2255 motion. The court found that it was bound by *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (per curiam), to conclude that *Johnson* did not invalidate § 924(c)(3)(B) and, therefore, to deny Estell's motion to vacate. However, in light of recent precedent, the court also recognized that reasonable jurists could find the question of

§ 924(c)(3)(B)'s constitutionality to be debatable and issued a certificate of appealability.

5. Mr. Estell appealed to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2255(d). Estell 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). Estell argued that both of these factors were also present in § 924(c)(3)(B), and that it was likewise unconstitutionally vague.[1] Estell further argued that his § 924(c) convictions should be vacated because the predicate offenses upon which they were based, bank robbery and carjacking, could only qualify as "crimes of violence" under § 924(c)(3)(B) rather than under the "force clause" of § 924(c)(3)(A). Estell pointed out that these offenses could both be committed via the element of "intimidation," and that a defendant in the Eighth Circuit could be convicted of bank robbery or carjacking 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.

[1] In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court found § 924(c)(3)(B) to be unconstitutionally vague based on the reasoning of *Johnson* and *Dimaya*.

6. In its opinion, the Eighth Circuit held that federal bank robbery and federal carjacking qualify as "crimes of violence" under the force clause of § 924(c)(3)(A). The court acknowledged Mr. Estell's arguments that the "intimidation" element in bank robbery and carjacking may be met through a defendant's reckless or negligent conduct, but found these arguments to be foreclosed by its reasoning in *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017). *See Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019). The court acknowledged that bank robbery by intimidation does not require a specific intent to intimidate, but found that intimidation still constitutes a threat of physical force because "'threat,' as commonly defined, 'speak[s] to what the statement conveys—not to the mental state of the author.'" *Harper*, 869 F.3d at 626 (quoting *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015)). "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." *Estell*, 924 F.3d at 1293. The court also cited *Harper* for the proposition that a threat of bodily harm requires a threat to use violent force because it is impossible to cause bodily injury without using force capable of producing that result. *Id.* (citing *Harper*, 869 F.3d at 626; *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017)). The court noted that this same reasoning applied to carjacking by intimidation, and that the offenses upon which Estell's § 924(c) convictions were predicated both qualify as crimes of violence under § 924(c)(3)(A). *Id.*

The court of appeals found that Mr. Estell's convictions and sentences under § 924(c)(1)(A) were not unconstitutional, and affirmed the judgment of the district court. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should resolve the important question of whether an offense that involves a negligently made threat of bodily harm can qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

In its opinion below, the Eighth Circuit held that the offenses of bank robbery under 18 U.S.C. § 2113(a) and carjacking under 18 U.S.C. § 2119(1) both qualify as "crimes of violence" under the force clause of 18 U.S.C. § 924(c)(3)(A). As Mr. Estell argued, and as the court of appeals noted, each of these offenses can be committed via "intimidation." Under the federal bank robbery statute, "intimidation" 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*).

In *Yockel*, the Eighth Circuit cited cases from the Fourth and Ninth Circuits holding that "intimidation" is measured by an objective standard and is not dependent upon whether the defendant possessed the intent to intimidate. 320 F.3d at 823-24 (citing *Woodrup*, 86 F.3d 359; *United States v. Foppe*, 993 F.2d 1444 (9th Cir. 1993)). The court of appeals recognized that, "[i]n this circuit, 'intimidation', as it is used in § 2113(a), is also determined by an objective standard." *Yockel*, 320 F.3d

at 824. Because of the applicability of this objective standard, "whether or not Yockel 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 court of appeals in *Yockel* concluded that "the *mens rea* element of bank robbery d[oes] not apply to the element of intimidation . . . ." *Yockel*, 320 F.3d at 824.[2] Accordingly, a defendant in a jurisdiction applying an objective standard to the element of intimidation[3] may be convicted of bank robbery without any showing of intent to intimidate.

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—

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

[3] The Eleventh Circuit has also applied an objective standard to a determination of whether the element of intimidation has been met. *See United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) ("Whether 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.").

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.*

Because the test for whether the intimidation element is met under the federal bank robbery and carjacking statutes is based upon whether a "reasonable person" would infer a threat from the defendant's actions, it likewise must be considered a negligence standard.[4] In other words, a defendant may be convicted of bank robbery by intimidation even if he negligently acts in an intimidating manner. The Eighth Circuit did not take issue with Mr. Estell's argument that the intimidation element of bank robbery or carjacking 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. Estell 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

[4] This is not to say that the overall offense of bank robbery is subject to proof by only a negligence standard, which would be in contravention of *Carter*. However, under the approach taken by the Eighth Circuit, "the *mens rea* for the *actus reus* of bank robbery is satisfied by proof that [the defendant] knew he was physically taking money." *Yockel*, 320 F.3d at 823. It is only the element of intimidation that is subject to a negligence standard; the overall offense requires proof of general intent as to the taking of property.

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). As Estell has argued, 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.*

There is plentiful case law indicating that defendants may be convicted of federal bank robbery based on negligent actions that are found to be objectively intimidating. 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.

One of the factors relied upon by the 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. A court would certainly take other similar aspects of a defendant's appearance into account in making an objective determination as to whether a reasonable teller might have been intimidated—a teller might testify, for example, that the robber was physically large and imposing, or had visible tattoos, or dressed in a certain way, or had a bushy beard, or wore an unpleasant expression on his face.

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 Kelley*, 412 F.3d at 1245 (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 teller 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 used of physical force against the person of another (*see* 543 U.S. at 9); however, a bank robber stumbling and falling into a teller—or even just near one—could surely be viewed as objectively intimidating from the teller'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 an offense such as bank robbery or carjacking despite only accidentally or negligently intimidating a reasonable bank teller.

The question presented by the instant case is an important one: does the rationale of *Leocal* apply both to 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). The courts have also considered arguments based on *Leocal* that certain offenses do not qualify as "violent felonies" under the Armed Career Criminal Act 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. Estell's arguments on this issue to be foreclosed by the reasoning of *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017). *Estell*, 924 F.3d at 1293. 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, 'speak[s] 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." *Estell*, 924 F.3d at 1293. The court did not actually address Estell'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 bank robbery 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. Estell urges this Court to grant review in this case to clarify this important point of law.

CONCLUSION

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

DATED: this 30th day of August, 2019.

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