No. 20-5640

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE NORTHCUTT,

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The core question presented in this case was at the heart of the oral argument on November 3, 2020 in *Borden v. United States* (Case No. 19-5410): When a sentencing enhancement statute with draconian penalties that strip federal judges of their sentencing discretion under 18 U.S.C. § 3553(a) includes the limiting language "against the person of another," is said language mere surplusage such that we look simply to the result of a defendant's conduct, as the government contends, irrespective of whether the government had to prove as an element of the offense that the defendant was aware of the possibility that his conduct could result in harm to another? Pursuant to *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the answer is no.

Just as the government attempted to do in *Borden*, the government here wants to focus on the resulting harm—that an ordinary bank teller perceived a bank robber's conduct as intimidating—and extrapolate from there that the conduct the bank robber committed had a serious potential for danger, *i.e.*, contained an "implicit threat" of harm, and thus should qualify as a crime of violence that strips judges of their sentencing discretion. While that analysis might have worked under the residual clause, this Court struck down the residual clause as unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019); *c.f.*, *Stokeling v. United States*, 138 S. Ct. 544, 564 n.2 (2019) (Sotomayor, J., dissenting) (cautioning against "nostalgia for the residual clause" leading to jurisprudential "confusion in the lower courts"). The government's argument in this case, and in

Borden, sound in precisely this nostalgia—and so do the circuit courts' decisions holding that bank robbery is a crime of violence.

Contrary to the government's results-based analysis, the analysis under 18 U.S.C. § 924(c)(3)(A) is limited to what elements the government was actually required to prove beyond a reasonable doubt to secure a conviction, *United States v. Mathis*, 136 S. Ct. 2243 (2016), and specifically whether, as is relevant here, said elements required the government to prove beyond a reasonable doubt that the defendant necessarily *threatened* the use of physical force against another. § 924(c)(3)(A). The issue, therefore, is what the defendant actually understood he was doing, not what *resulted* from the defendant's conduct. In other words, when it comes to stripping judges of their sentencing discretion because someone is such a danger to the community, the issue is not whether someone perceived the defendant's conduct as threatening, but whether the defendant was at least aware that his conduct would be perceived by others as a threat of violent physical force against them and acted anyway.

Where the circuit courts have unanimously abandoned the requisite elements-based approach in favor of a results-based analysis that harkens back to the unconstitutional residual clause, urgent action is needed by this Court to (1) reaffirm that it meant what it said in *Mathis*, 136 S. Ct. at 2252—"consistent with the Sixth Amendment," the categorical analysis is limited to "what crime, with what elements, the defendant was convicted of"—and (2) reaffirm that it likewise meant what it said in *Leocal,* 543 U.S. at 9—when the statutory definition of a crime of

violence includes the limiting language "against the person of another," it is not enough that the defendant used physical force, he must have at least been aware that his conduct could result in harm to another or be perceived by another as a threat of physical force against them.

This case provides an excellent vehicle for this Court to provide much needed clarity, which if left unresolved could result in decades of unlawful imprisonment for thousands of individuals. The issue has been squarely presented and preserved in the lower courts. A favorable resolution would reverse the 20-year sentence Mr. Northcutt received on his § 924(c) conviction, and, considering that he has already served approximately 25 years of the 40-year sentence imposed, would likely result in his immediate release from custody.

I. Where the Government Fails to Cite a Single Case for the Proposition that a Conviction Under 18 U.S.C. § 2113(d) Requires Proof that a Defendant Was Aware that His Conduct Could be Perceived as a Threat of Physical Harm Against Another, Pursuant to *Leocal v. Ashcroft*, Armed Bank Robbery Cannot Qualify as a Crime of Violence Under 18 U.S.C. § 924(c)(3)(A).

The government's Brief in Opposition ("BIO") relies on the arguments it made in its Brief in Opposition in *Johnson v. United States*, No. 19-7079 (Apr. 24, 2020) ("Johnson BIO"). BIO at 9-10. Tellingly, in its Johnson BIO, the government makes Northcutt's point for him. The government cites *United States v. Williams*, 864 F.3d 826, 828 (7th Cir. 2017) for the proposition that for purposes of 18 U.S.C. § 2113, "[i]ntimidation means the threat of force and exists when a bank robber's words and actions would cause an ordinary person to feel threatened, by giving rise to a reasonable fear that resistance or defiance will be met with force" and *United*

States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016) for the proposition that the requisite intimidation is established so long as 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 . . . because bank robbery under [Section] 2113(a) inherently contains a threat of violent physical force." Johnson BIO 9-10. The government then makes the untenable leap that there is thus "'no 'space' between 'bank robbery' and 'crime of violence.'" *Id.* (quoting *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991).

There is only "no space" between federal bank robbery and a definition of a crime of violence that includes the limiting language "against the person of another," if one disregards this Court's reasoning in *Leocal*. As Justice Gorsuch recently reminded the government at oral argument in *Borden*, when Congress elects to include the limiting language "against the person of another," it is not enough to simply look at the defendant's conduct and the resulting harm, the critical issue is the defendant's awareness of how his intentional conduct might impact another. *Borden*, No. 19-5410, Tr. of Oral Arg. (Nov. 3, 2020), at 57-59 (rejecting the government's assertion that "against the person of another" simply refers to the object of the physical force "because of *Leocal*'s express instruction that it has something to say about *mens rea*"). Indeed, the Court in *Leocal* explicitly chastised the government for simply looking at the defendant's use of force without inquiry into whether the conviction required proof that the defendant was aware of how his conduct might impact another when he acted. *Leocal*, 543 U.S. at 9. Yet

that is exactly what the government continues to do in *Borden* (Tr. of Oral Arg., at 43, 48, 58) and here (Johnson BIO, at 9-12), focusing only on the resulting injury or the perception of a threat by another, irrespective of whether the defendant had any awareness that his conduct could result in harm to another.

Of course, that makes no sense when the purpose of a sentencing enhancement such as § 924(c) that strips judges of their sentencing discretion under § 3553(a) is to narrowly target those defendants who have demonstrated such extreme callousness towards others that even when they perceive that their conduct will harm another they do not correct course. *Begay v. United States*, 553 U.S. 137, 145 (2008). And, not surprisingly, pursuant to *Leocal,* that is not the law.

Tellingly, the government does not cite to a single case for the proposition that in order to secure a conviction under § 2113(d), it has to prove that the defendant was aware that his conduct could be perceived by another as a threat of physical harm.[1] Where the requisite analysis is limited to elements, *Mathis*, 136 S.

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[1] Instead the government simply cites to the very circuit court cases that Mr. Northcutt challenges for their failure to both limit their analysis to the elements of the offense as required by *Mathis* and to follow *Leocal*'s admonition that the limiting language "against the person of another" requires proof that when the defendant acted he was more than merely negligently regarding the possibility that his conduct could be perceived as a threat of violent physical force against another. Johnson BIO at 7-8 (citing, among other cases, *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir. 2016) (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") (emphasis added); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) ("Intimidation concerns whether an *ordinary person would feel threatened under the circumstances*") (emphasis added); *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) (intimidation "requires that the defendant take property in such a way that would put *an ordinary, reasonable*

Ct. at 2252, that failure is dispositive. *See, e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("[W]e must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense.") (internal quotation marks and alterations omitted).

The government's failure is not surprising given that there is no ambiguity, as evidenced by the government's own citations to *Williams* and *Armour* (Johnson BIO 9-10), that a conviction for bank robbery by intimidation will be sustained without proof that the defendant understood his conduct could be perceived by others as threatening physical harm. *See also*, *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (holding that the element of intimidation is an objective reasonable person inquiry and thus "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating"); *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (holding that "nothing in the statute even remotely suggests that the defendant must have intended to intimidate," and thus, "the intimidation element of § 2113(a) is satisfied. . .whether or not the defendant actually intended the intimidation"); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (holding that whether the defendant understood his conduct would be perceived as intimidating is "irrelevant" given that "[t]he determination of

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person in fear of bodily harm") (emphasis added); *United States v. McCraine*, 889 F.3d 677, 680 (10th Cir. 2018) (citing the Tenth Circuit Criminal Pattern Jury Instructions for the proposition that "intimidation" merely requires a defendant "to say or do something in such a way that *a person of ordinary sensibilities would be fearful of bodily harm*") (emphasis added)).

whether there has been an intimidation should be guided by an objective test focusing on the accused's actions") (quotations omitted).

Revealingly, the government's position here is in direct conflict with the position it has taken when attempting to actually *secure a conviction* for bank robbery by intimidation. In *United States v. Yockel*, 320 F.3d 818, 823–24 (8th Cir. 2003), the defendant sought to introduce mental health evidence to rebut the government's proof that he knew his conduct was intimidating. The government opposed the request on the basis 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" and "[s]ince intimidation is determined under an objective standard, defendant's subjective intent is irrelevant." Government's Answering Brief, *United States v. Yockel*, 2002 WL 32144417, at 28-30. The Eight Circuit agreed. *Yockel*, 320 F.3d at 823.

Given that a defendant's awareness that his conduct might be perceived by others as a threat of violent physical force is not an element of the offense, it is hardly surprising that circuit courts across the country have upheld convictions for bank robbery by intimidation where a defendant simply made a demand for money or physically took money without making a threat of physical force against another. *See, e.g.*, *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983); *United States v. Lucas*, 963 F.2d 243, 244 (9th Cir. 1992); *Kelly*, 412 F.3d at 1244–45; *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008); *United States v. Caldwell*, 292 F.3d 595, 597 (8th Cir. 2002); *United States v. Slater*, 692 F.2d 107,

107-08 (10th Cir. 1982). *See also United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002) (holding that "unequivocal written and verbal demands for money to bank employees are a sufficient basis for a finding of intimidation."). These cases demonstrate that the least serious conduct encompassed by bank robbery by intimidation requires only a request for money—not the threatened use of violent force.

Because a defendant can be convicted of violating § 2113 without the government having to prove beyond a reasonable doubt that the defendant was aware that his conduct could be perceived as a threat of violent physical force against another, he lacks the awareness—*mens rea*—required by *Leocal*. In other words, Mr. Northcutt has shown a "realistic probability" that a defendant may be convicted of armed bank robbery without threatening violent force against another, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), and thus bank robbery is not a categorical match for § 924(c)(3)(A).

II. This Case Is an Excellent Vehicle for this Court to Clarify that When the Statutory Definition of Crime of Violence Includes the Limiting Language "Against the Person of Another," the Dispositive Element of the Predicate Offense is Not the Defendant's Use of Force and its Resulting Consequence, But Rather the Defendant's Awareness that His Conduct Could Harm Another.

This case presents an excellent vehicle to provide much needed clarification regarding application of this Court's decision in *Leocal*. The circuit courts are routinely treating the language "against the person of another" as mere surplusage notwithstanding the fact that it was the very presence of said limiting language upon which this Court rested its holding in *Leocal*, reasoning that said language

requires proof that the defendant not only used physical force, but that when he did so, he was more than merely negligent about the possibility that his intentional conduct could physically harm (or be perceived as a threat to physically harm) another. Mr. Northcutt squarely raised the issue below, but because the Ninth Circuit had previously held in *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) that federal bank robbery qualified as a crime of violence because bank robbery per se requires at least an "implicit threat," the three-judge panel did not believe it could revisit the issue absent direction from this Court. *United States v. Northcutt*, No. 19-16182, 2020 U.S. App. LEXIS 11607, at *1 (9th Cir. 2020).

The fact that Northcutt pled guilty pursuant to a plea agreement in which he waived certain appellate rights is irrelevant. As the government acknowledges, it "did not invoke petitioner's waiver in responding to his motion for postconviction relief under 28 U.S.C. §2255." BIO 12. Notwithstanding the government's suggestion to the contrary, that *does* preclude this Court from considering his waiver as a reason to deny review. The waiver is an affirmative defense that the government needed to assert below; it elected not to. *See, e.g.*, *Garza v. Idaho*, 139 S.Ct. 738, 745 (2019) ("[E]ven a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver."). In his § 2255 petition filed in district court, Mr. Northcutt acknowledged that he had entered into a plea agreement with certain waivers, but explained that such waivers were not jurisdictional and thus "[s]hould the government seek to enforce the waiver, Mr. Northcutt reserve[d] the right to challenge it." *United States v. Northcutt*, No. 1:96-cr-5067, Defendant's

Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255, Dkt. Entry 38 (E.D. Cal. Jun. 22, 2016), at 1. The government chose not to enforce the waiver either in district court or at the Ninth Circuit. The government has waived the affirmative defense. *See, e.g.*, *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995) ("This court will not address waiver if not raised by the opposing party."); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (holding government "waived [its] waiver" argument by failing to raise it); *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992) ("[A]n argument not raised on appeal is deemed abandoned.").

The government's citation to *Day v. McDonough*, 547 U.S. 198 (2006) does not advance its case. Notably, in *Day*, this Court observed that "we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." *Id.* at 202. In other words, where, as was the case here, the government was clearly on notice of its affirmative defense, and elected not to raise said defense, the defense is waived. *Day* presented an exceptional circumstance in that it was clear the government was unaware of the affirmative defense because it had unequivocally miscalculated the amount of time that had elapsed so it missed the timeliness issue; this Court permitted the federal court to correct the government's clear error. *Id.* In sharp contrast, here there is no ambiguity that the government knew it could invoke the waiver as an affirmative defense; it simply elected not to so. There is no error that needs to be corrected here. The government is bound by its strategic decision not to invoke the wavier below.

The government is also incorrect that a decision invalidating his § 924(c) conviction would have no impact on the length of his incarceration. To the contrary, a favorable decision would likely result in his immediate release. As a result of his bank robbery spree that occurred during the span of a month and a half in 1995, Mr. Northcutt received a sentence of approximately 40 years, with 25 years on his § 924(c) convictions[2] and the remaining 15 years tied to his bank robbery convictions. Mr. Northcutt has served almost 25 years of his 40-year sentence, the bulk of which was premised on his § 924(c) convictions. He was 30 when he was sentenced; he is now 55 years old. In other words, 25 years will have elapsed since the district court last sentenced him, and "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines range"). *Pepper v. United States*, 562 U.S. 476, 480-81 (2011) (recognizing that pursuant to 18 U.S.C. § 3553(a) sentencing judges have "wide discretion" to consider the background, character and conduct of the person before them as they exist at the time of re-sentencing).

Not only does Mr. Northcutt have 25 years of additional background, conduct and character for the court to consider at re-sentencing, at least in the Eastern District of California, how sentencing judges understand the interplay between mental illness, substance abuse, and the criminal law has evolved over the past 25

[2] Twenty of those years is attributed to his § 924(c) conviction challenged here.

years. Moreover, when the district court last imposed sentence, Mr. Northcutt was subject to the mandatory sentencing guidelines that were abolished by *United States v. Booker*, 543 U.S. 220, 226-27 (2005) and this Court had not yet clarified in *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017), that sentencing courts are permitted to impose sentences as low as one day in custody on the predicate crime of violence to offset the draconian penalties associated with § 924(c) convictions.

Additionally, with the enactment of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), Congress has clarified its intent when it comes to sentencing § 924(c) convictions that occur during the same crime spree. At the time Mr. Northcutt entered into his plea agreement, the first § 924(c) conviction required a 60 month sentence and every one thereafter required a 20-year sentence, which meant that with three charged § 924(c) convictions, Mr. Northcutt was facing a sentence of 45 years on just the § 924(c) counts alone. Because of the leverage it had over him, Mr. Northcutt agreed to enter into a plea agreement in exchange for the government dismissing one of the § 924(c) counts, saving him 20 years. With the passage of the First Step Act, it is Congress' clear intent that the maximum Mr. Northcutt should have received on the § 924 counts resulting from his robbery spree was 60 months on each, or a total of 15 years (in sharp contrast to the 45 years he faced at the time he entered into the plea agreement in 1996). Not surprisingly, in light of the First Step Act, pursuant to 18 U.S.C. § 3582(c), federal courts around the country are unwinding lengthy sentences tethered to stacked § 924(c) convictions such as Mr. Northcutt's. *See, e.g.*, *United States v. Haynes*, No. 93-cr-

1043, 2020 U.S. Dist. LEXIS 71021, at *12 (E.D.N.Y. Apr. 22, 2020) (observing that "outlawing the draconian practice of 'stacking' § 924(c) convictions for sentencing purposes in a single prosecution. . . was an extraordinary development in American criminal jurisprudence. A modern-day dark ages—a period of prosecutorial § 924(c) windfall courts themselves were powerless to prevent—ha[s] come to an end."); *United States v. Davis*, No. 8:94-cr-42, 2020 U.S. Dist. LEXIS 152729, at *5 (D. Neb. Aug. 24, 2020) (finding the fact that the defendant's current sentence "is most likely 216 months longer than that which he would receive if sentenced under current law. . . to be an extraordinary and compelling reason for a sentence reduction"); *United States v. McPherson*, No. 94-cr-5708, 2020 WL 1862596, at *5 (W.D. Wash. Apr. 14, 2020) ("So we have here [the defendant], sentenced to over 32 years in prison for what is now probably a 17-year crime. His sentence was 15 years beyond what is now deemed a fair penalty by our law, and he has already served 26 years of that now clearly unfair sentence. It is extraordinary that a civilized society can allow this to happen to someone who, by all accounts, has long since learned his lesson.").

In other words, the government's unsupported assertion that vacating Mr. Northcutt's § 924(c) conviction and the 20-year sentence tied to it would not impact the total length of his incarceration, is not only without basis, it is absurd. To the contrary, this case is an ideal vehicle to address the continuing significance of *Leocal* in determining what offenses constitute a crime of violence, with the resolution of this issue likely determinative of whether Mr. Northcutt can be

released from custody after 25 years or whether he must remain in custody for another 15 years.

CONCLUSION

For all the above reasons, together with those presented in the petition, this Court should grant Mr. Northcutt's petition for a writ of certiorari.

Dated: November 14, 2020

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