No. _____

IN THE SUPREME COURT OF THE UNITED STATES

D'ANGELO DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Is federal bank robbery a crime of violence under the force clause of 18 U.S.C. § 924(c), in light of this Court's holding in *Carter v. United States*, 530 U.S. 255, 268 (2000), that the offense is a general intent crime, and given decades of circuit precedent holding that intimidation under the statute does not require purposeful, violent conduct?

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Petitioner D'Angelo Davis respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on June 8, 2020.

OPINION BELOW

On June 8, 2020, the Court of Appeals granted the government's motion for summary affirmance of the denial of Mr. Davis's petition for a writ of habeas corpus under 28 U.S.C. § 2255 in the district court. *See United States v. Davis,* 2020 U.S. App. LEXIS 18009, 2020 WL 5905071 (9th Cir. Jun. 8, 2020) (App. 1-2).

JURISDICTION

On June 8, 2020, the Court of Appeals affirmed the denial of Mr. Davis's habeas petition. App. 2. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal statute criminalizing armed bank robbery states:

> (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;
> * * *
> (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.

18 U.S.C. § 2113.

The federal statute criminalizing use of a firearm during a crime of violence defines a "crime of violence" as a felony that:

> (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. § 924(c)(3).

STATEMENT OF THE CASE

In 1998, a jury found Mr. Davis guilty of four counts of armed bank robbery under 18 U.S.C. § 2113(a) and (d) and four counts of using a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). App. 6. One of the § 924(c) counts was stricken on appeal. *Id.* at p. 7. After multiple appeals and remands, he was sentenced to an aggregate term of 728 months on the remaining four § 2113 counts and three § 924(c) counts. App. 7.

In 2015, this Court held in *Johnson v. United States*, 576 U.S. 591 (2015),

that the "residual clause" of the Armed Career Criminal Act was unconstitutional because it was void for vagueness. Within one year of *Johnson*, Mr. Davis filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 arguing that the nearly-identical "residual clause" in § 924(c) was similarly void for vagueness. App. 7. Mr. Davis also argued that federal bank robbery did not satisfy an alternative crime of violence definition under 18 U.S.C. § 924(c)(3)(A) that covered offenses requiring the "use, attempted use, or threatened use of physical force. " App. 7.

The district court denied Mr. Davis's habeas petition, finding that, while the "residual clause" is unconstitutional because it is void for vagueness, his convictions remained crimes of violence under an alternative definition of "crime of violence" unaffected by *Johnson*. App. 10-11. Although it denied his petition, the district court granted Mr. Davis a certificate of appealability. App. 5.

On appeal to the Ninth Circuit, Mr. Davis again contended that his § 924(c) convictions fell exclusively under the residual clause. The government filed a motion for summary affirmance, contending the Ninth Circuit's prior decision in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) was controlling. The Ninth Circuit agreed with the government and granted the motion for summary affirmance. App. 1.

This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

Mr. Davis's case presents a compelling question in need of resolution. Circuit

courts continue to hold that federal bank robbery by intimidation categorically qualifies as a crime of violence for purposes of the force clause at 18 U.S.C. § 924(c)(3)(A). But "intimidation," as construed by this Court in *Carter v. United States*, 530 U.S. 255, 268 (2000), and by the circuit courts in sufficiency-of-the-evidence cases, requires no specific intent on the part of the defendant, nor does it require that the defendant communicate an intent to use violence. The Court should grant certiorari to bring internal consistency to federal circuit precedent interpreting the intimidation element of federal bank robbery.

Mr. Davis's case gives the Court an opportunity to resolve this important issue. His § 924(c) convictions rest on a federal bank robbery statute that courts have repeatedly held does not require purposeful or violent conduct. He preserved his legal claims and filed them timely at every stage of litigation.

Accordingly, review on certiorari is warranted under this Court's Rule 10.

REASONS FOR GRANTING THE PETITION

I.

As Interpreted by This Court and the Courts of Appeal, Federal Bank Robbery Is Not a Crime of Violence Under 18 U.S.C. § 924(c)(3)(A) Because, "Intimidation" Does Not Require the Use or Threatened Use of Violent Force.

Federal armed bank robbery is not a categorical match for § 924(c)(3)(A) (the "force clause") for two independent reasons. First, the force clause requires purposeful conduct, while this Court has held that bank robbery is a general intent crime, with no culpable *mens rea* as to the intimidation element. Second, the force clause requires physical force that is violent in nature, while bank robbery by

intimidation does not require a communicated intent to use violence.

A. The Force Clause Requires a Purposeful Threat, While Bank Robbery by Intimidation Is a General Intent Crime That Does Not Require Any Intent to Intimidate.

In *Leocal v. Ashcroft*, this Court held that the "use of physical force against the person or property of another" within the meaning of § 924(c) means "active employment" of force and "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. 1, 9 (2004). In *Watson*, the Ninth Circuit considered and rejected the defendant's claim that the bank robbery statute permits a defendant's conviction "if he only negligently intimidated the victim." 881 F.3d at p. 785. Citing *Carter*, the Ninth Circuit concluded that federal bank robbery "must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Id.*

But *Watson*'s conclusion that bank robbery by intimidation requires a knowing threat of force is inconsistent with *Carter* and the intimidation element of bank robbery under circuit precedent. In *Carter*, the question was whether § 2113(a) implicitly requires an "intent to steal or purloin," which is an element of the related offense of bank larceny in § 2113(b). 530 U.S. at p. 267. In evaluating that question, this Court emphasized that the presumption in favor of scienter would allow it to read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct." *Id.* at p. 269. Thus, the Court recognized that § 2113(a) "certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)." *Id.* at p. 269.

But the Court found no basis to impose a specific intent requirement on § 2113(a). *Id.* at pp. 268-69. Instead, the Court determined that "the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation)." *Id.* at p. 268 (emphasis in original). So under *Carter*, a defendant must be aware that he or she is engaging in the actions that constitute a taking by intimidation, but the government need not prove that the defendant knew the conduct was intimidating.

This reading of *Carter* finds support in circuit precedent both pre-dating and post-dating the opinion. Prior to *Carter*, the Ninth Circuit defined "bank robbery by intimidation" as "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). That definition attached the willful *mens rea* solely to the "taking" element of bank robbery, not the "intimidation" element.

Similarly, in *United States v. Foppe*, the Ninth Circuit rejected a jury instruction that would have required the jury to conclude that the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The court never suggested that the defendant must know the actions were intimidating. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."). And in *United States v. Hopkins*, the Ninth Circuit held that the defendant used "intimidation" by simply presenting a demand note stating, "Give me all your hundreds, fifties and twenties. This is a

robbery," even though he spoke calmly, was unarmed, and left the bank "in a nonchalant manner" without having received any money. 703 F.2d 1102, 1103 (9th Cir. 1983). The court approved a jury instruction that stated intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear. *Id.*

Other circuit decisions reflect the same interpretation of intimidation that focuses on the objectively reasonable reaction of the victim rather than the defendant's intent. The Fourth Circuit held in *United States v. Woodrup* that "[t]he intimidation element of § 2113(a) is satisfied if 'an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts,' whether or not the defendant actually intended the intimidation." 86 F.3d 359, 363 (4th Cir. 1996) (quoting *United States v. Wagstaff*, 865 F.2d 626, 627 (4th Cir. 1989)). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Woodrup*, 86 F.3d at p. 364. The Eleventh Circuit also held in *United States v. Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d 1240, 1244 (11th Cir. 2005).

Finally, the Eighth Circuit case of *United States v. Yockel*, decided three years after *Carter*, leaves no doubt on the matter—there, the court expressly stated that a jury may not consider the defendant's mental state, even as to knowledge of the intimidating character of the offense conduct. 320 F.3d 818, 823-24 (8th Cir. 2003). In *Yockel*, the defendant was attempting to withdraw $5,000 from his bank

account, but the teller could not find an account in his name. 320 F.3d at p. 820. Eventually, after searching numerous records for an account, the defendant told the teller, "If you want to go to heaven, you'll give me the money." *Id.* at p. 821. The teller became fearful, and "decided to give Yockel some money in the hopes that he would leave her teller window." *Id.* She gave Yockel $6,000 and asked him, "How's that?" The defendant responded, "That's great, I'll take it." *Id.*

The government filed a motion in limine seeking to preclude evidence of the defendant's mental health offered to demonstrate his lack of intent to intimidate. *Id.* at p. 822. The defendant argued that the evidence was relevant because bank robbery requires knowledge with respect to the intimidation element of the crime. *Id.* The district court disagreed and "exclude[d] mental health evidence in its entirety as not relevant to any issue in the case." *Id.* The Eighth Circuit affirmed. *Id.* at p. 823. Citing *Foppe*, the court held that intimidation is measured under an objective standard, without regard to the defendant's intent, and is satisfied "if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the [defendant's] acts[.]" *Id.* at p. 824 (internal quotation marks and alterations omitted). Accordingly, the court decided that "the *mens rea* element of bank robbery [does] not apply to the element of intimidation[.]" *Id.*

Together, *Carter* and these circuit cases establish that a defendant is guilty of bank robbery by intimidation within the meaning of § 2113(a) so long as the defendant engages in a knowing act that reasonably instills fear in another, without regard to the defendant's intent to intimidate. As so defined, intimidation cannot satisfy § 924(c)(3)(A)'s *mens rea* standard. The fact that § 2113(a) requires a

defendant "to actually know the words of and circumstances surrounding" the taking by intimidation "does not amount to a rejection of negligence." *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (interpreting federal threat statute). Rather, a threat is committed negligently when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" *Id.*

B. The Force Clause Requires a Threatened Use of *Violent* Physical Force, Whereas Bank Robbery by Intimidation Does Not Require a Defendant to Communicate any Intent to Use Violence.

Even if § 2113(a) proscribed a sufficient *mens rea* for the "intimidation" element of the offense, the statute does not require a threatened use of *violent* physical force. In *Stokeling v. United States*, this Court confirmed that "physical force" within the meaning of the force clause must be "'*violent* force—that is, force capable of causing physical pain or injury to another person.'" 139 S. Ct. 544, 553 (2019) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2015) (emphasis in original). Physical force does not include mere offensive touching. *Id.* In *Watson*, the Ninth Circuit reasoned that, because "intimidation" in § 2113(a) must be objectively fear-producing, it satisfies the degree of force required under § 924(c)'s force clause. 881 F.3d at p. 785 ("[A] 'defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury.'" (quoting *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017)).

But that reasoning is in error because it is the content of a communication that defines a threat, not the reaction of the victim. As this Court recognized in

Elonis, the common definition of a threat typically requires a "*communicated* intent to inflict harm or loss on another[.]" 135 S. Ct. at p. 2008 (quoting Black's Law Dictionary 1519 (8th ed. 2004)) (emphasis added). An uncommunicated "willingness to use violent force is not the same as a threat to do so." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016). Thus, the fact that conduct might provoke a reasonable fear of bodily harm does not prove that the defendant "communicated [an] intent to inflict harm or loss on another." *Elonis*, 135 S. Ct. at p. 2008.

Intimidation does not require a communicated threat. For purposes of § 2113(a), intimidation can be (and frequently is) accomplished by a simple demand for money, without regard to whether the bank teller is afraid. *See, e.g., United States v. Nash,* 946 F.2d 679, 681 (9th Cir. 1991) ("[T]he threat implicit in a written or verbal demand for money is sufficient evidence to support [a] jury's finding of intimidation."); *Hopkins*, 703 F.2d at p. 1103 ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]' are not required for a conviction for bank robbery by intimidation," (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980))).

In *United States v. Ketchum*, the defendant handed a teller a note that read: "These people are making me do this," and then orally stated, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." 550 F.3d 363, 365 (4th Cir. 2008). The defendant's statement did not evidence a threat of force by

the defendant against a victim (the defendant stated that he feared violence himself), but it was still held sufficient to qualify as "intimidation" under § 2113(a). *Id.*

Similarly, in *United States v. Lucas*, a defendant's bank robbery conviction was upheld where he placed several plastic shopping bags on the counter along with a note that read: "Give me all your money, put all your money in the bag," and then repeated, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). And, in *United States v. Smith*, the Eighth Circuit found sufficient evidence to affirm the defendant's bank robbery conviction where the defendant told the teller he wanted to make a withdrawal, and when the teller asked if that withdrawal would be from his savings or checking account, he stated, "No, that is not what I mean. I want to make a withdrawal. I want $2,500 in fifties and hundreds," and then yelled, "you can blame this on the president, you can blame this on whoever you want." 973 F.2d 603, 603 (8th Cir. 1992).

Although each of these cases involved circumstances that were deemed objectively fear-producing, the defendants made no written, oral, or physical threats to use "violent" force if the tellers refused. A simple demand for money does not implicitly carry a threat of violence because not all bank robbers are prepared to use violent force to overcome resistance. *See Parnell*, 818 F.3d at p. 980 (rejecting a similar argument that a purse snatching necessarily implies a threat of violent force and reasoning that, "[a]lthough some [purse] snatchers are prepared to use violent force to overcome resistance, others are not").

Nor is bank robbery by intimidation limited to those cases where a defendant makes a verbal demand for money. In *United States v. Slater*, for example, the defendant simply entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but the defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what he was doing. 692 F.2d 107, 107-108 (10th Cir. 1982); *accord United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (unpublished) (affirming finding of intimidation where the defendant reached over the counter and took money from an open teller drawer after asking the teller for change). Those bank robberies involved no violence, nor any communicated intent to use violence, beyond that used in a typical purse snatching.

As *Watson* recognized, "intimidation" under § 2113(a) is not defined by the content of any communication, but rather by the reaction that the defendant's conduct might objectively produce. 881 F.3d at p. 785. Because conduct can be frightening, yet still not contain a threat, bank robbery by intimidation does not require a threatened use of violent physical force. Accordingly, the circuits have drastically strayed from precedent in concluding that intimidation requires a communicated threat to use violent force.

C. The Correct Interpretation of "Intimidation" Is an Exceptionally Important Question Because of its Broad Impact on Standards for Conviction and Sentencing.

This Court should grant certiorari because the circuits have, in effect, given "intimidation" under 18 U.S.C. § 2113(a) two contradictory meanings depending on whether the issue arises in the sufficiency-of-the-evidence context or on review under the categorical approach. Having a clear and consistent definition of the

intimidation element of federal bank robbery is crucial to both the government and the defendant in prosecutions for that offense, and it will assist the courts in efficiently administering the law. Correctly understanding the scope of the intimidation element of federal bank robbery is at the heart of determining whether the offense qualifies for numerous categorically-defined federal sentencing enhancements for crimes involving intentional violence, including the harsh mandatory minimum sentences required by the ACCA. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial.

CONCLUSION

For these reasons, Mr. Davis respectfully requests that the Court grant his petition for a writ of certiorari.

Date: November 5, 2020

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