

No. 20-6284

IN THE SUPREME COURT OF THE UNITED STATES

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D'ANGELO DOMINGO DAVIS,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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

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REPLY TO MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION

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## PETITIONER'S REPLY MEMORANDUM

Mr. Davis is currently serving a 728-month prison sentence based on his convictions on four counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d), together with three counts of using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). App. 6-7. If Mr. Davis' bank robbery convictions do not constitute crimes of violence, the § 924(c) convictions are not valid,<sup>1</sup> and he is accordingly entitled to a substantial reduction of his sentence, *viz.*, a reduction by 540 months,<sup>2</sup> which would yield an aggregate sentence of 188 months.

The Solicitor General accurately characterizes the issues Mr. Davis raises in his certiorari petition: Mr. Davis respectfully contends armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), does not qualify as a “crime of violence” because armed bank robbery is a general intent crime, which can be proven by mere negligent intimidation. Opp. Memo. 1-2.

“To determine whether [an offense] qualifies as a violent felony under 18 U.S.C. § 924(e), [courts] apply the ‘categorical approach’ outlined by th[is] ... Court in *Taylor v. United States*, 495 U.S. 575 (1990).” *United States v. Parnell*, 818 F.3d 974, 978 (9th Cir. 2016) (citing *United States v. Jennings*, 515 F.3d 980, 987 (9th

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<sup>1</sup> To establish a violation of 18 U.S.C. § 924(c), the government must prove the commission of an underlying crime of violence. *United States v. Davis*, 139 S. Ct. 2319, 2327 (2019); *United States v. Holloway*, 259 F.3d 1119, 1202 (9th Cir. 2001).

<sup>2</sup> Mr. Davis received a 60-month term of imprisonment for one of the 924(c) convictions, and consecutive 240-month terms for each of the other two 924(c) convictions. App. 7.

Cir. 2008)). “[T]he categorical approach … focuses solely on the elements of the offense, rather than on the facts of the case.” *In re Irby*, 858 F.3d 231, 233 (4th Cir. 2017); *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014). (Under the categorical approach, the particular facts of the defendant’s case do not matter; instead, the Court examines the elements of the offense.).

Notwithstanding the existence of contrary precedent, Opp. Memo. 2-3, application of the categorical approach in the instant case yields the conclusion that Mr. Davis’ bank robbery convictions do not constitute crimes of violence. Hence, his § 924(c) convictions cannot stand.

In proceedings below, the district court and Ninth Circuit held they were constrained to deny Mr. Davis’ challenge to his § 924(c) convictions based on the holding that bank robbery constitutes a crime of violence, which was rendered by the Ninth Circuit in *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). App. 1, 4. However, the district court noted “there is ‘tension’ between the holding in *Watson*” and this Court’s decision in *Carter v. United States*, 530 U.S. 255, 268 (2000), as well as other Ninth Circuit precedent. App. 4 (citing *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Rich*, No. 6:08-CR-60126 MC, 2018 WL 2357534 at \*2, 2018 U.S. Dist. Lexis 87086 (D. Or. May 23, 2018); *United States v. Dawson*, 300 F.Supp.3d 1207 (D. Or. 2018).

In *Carter*, this Court held that the *mens rea* required to establish a violation of 18 U.S.C. § 2113(a) is “*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). *Carter*, 530 U.S. at 268 (italics in the original).

In *Parnell*, the Ninth Circuit explained:

By its very nature, of course, armed robbery is a serious and dangerous crime. The possession of a dangerous weapon may indicate a robber's willingness to use that weapon if necessary to accomplish the criminal undertaking.... The mere fact an individual is armed, however, does not mean he or she has used the weapon, or threatened to use it, in any way.... There is a material difference between the presence of a weapon, which produces a risk of violent force, and the actual or threatened use of such force. Only the latter falls within ACCA's force clause.

*Parnell*, 818 F.3d at 980.

Taken together, *Carter* and *Parnell* appear to establish a rule that the government need not prove any force or violence to secure a federal bank robbery conviction, but may instead do so by merely proving intimidating conduct on the part of the accused, even if the intimidation was exhibited as a result of negligence, rather than intention. Mere intimidation does not necessarily involve or constitute force and/or violence. As a matter of common sense, intimidation can be nonviolent.

*Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20 Civ. 8668 (VM), 2020 U.S. Dist. Lexis 200799, \*50, 2020 WL 6305325 (S.D.N.Y. Oct. 28, 2020) (adverting to “nonviolent intimidation”); Kurland, The Guarantee Clause As a Basis for Federal Prosecutions of State and Local Officials, 62 S. Cal. L. Rev. 367, 443 n. 277 (1989) (adverting to “nonviolent corruption and intimidation”). For example, a bank robber could nonviolently intimidate a teller by threatening to tell the teller's spouse that the teller has been cheating on his/her spouse. Thus, applying the

categorical approach, Mr. Davis' bank robbery convictions do not constitute crimes of violence.

The question presented in this case is the same as that presented in *Johnson v. United States*, No. 19-7079. Indeed, the Solicitor General's opposition to Mr. Davis' certiorari petition is based substantially on the opposition it filed in *Johnson*. Opp. Memo. 2. Thus, in addition to relying on the points and authorities presented above and in his certiorari petition, Mr. Davis relies on the certiorari-stage-briefing of the petitioner in *Johnson*.

#### CONCLUSION

Based upon the foregoing, the petition for a writ of certiorari should be granted.

Date: February 10, 2021

Respectfully submitted,

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