No. 20-6447

In The Supreme Court Of The United States

Michael Anthony Cernak,

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 Michael Cernak's Reply Brief

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The government relies on its brief in opposition filed last year in *Johnson v. United States*, No. 19-7079 (Apr. 24, 2020), in responding to the federal circuit courts' unrelenting position that federal armed bank robbery qualifies as a predicate crime of violence under 18 U.S.C. § 924(c)(1)(A)'s elements clause. While the government does not dispute several issues Petitioner Michael Cernak raises in his Petition, Cernak notes the government's incorporation of its *Johnson* opposition brief references issues that may be relevant *Johnson* but are not relevant here.[1] Cernak replies only to the relevant matters.

I. The government does not dispute this Court retroactively invalidated 18 U.S.C. § 924(c)(3)(B)'s residual clause.

Cernak explained that *United States v. Davis*, 139 S. Ct. 2319 (2019), holding the residual clause in 18 U.S.C. § 924(c)(3)(B) unconstitutionally void for vagueness under the Due Process Clause, is a substantive rule applying retroactively to cases on collateral review as it alters the range of conduct and class of persons punishable under § 924(c)(3)(B). Pet. at 7-8. The government does not disagree. This case is thus an excellent vehicle for the Court to address *Davis*'s retroactivity and guide lower courts. *See, e.g., Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (holding

[1] For example, the government's *Johnson* Brief in Opposition contains a waiver argument even though the government does not raise a waiver argument against Cernak here. *See* Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 25-26). Indeed, waiver is not an issue in this case as the government agreed the district court should decide Cernak's motion to vacate "on its merits" under *Davis*. Dist. Ct. Dkt. 165, at p. 2.

Johnson v. United States, 135 S. Ct. 2551 (2015), applies retroactively on collateral review).

II. Certiorari is necessary to resolve whether "intimidation" under the federal armed bank robbery statute requires an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c)(1)(A).

A. Federal armed bank robbery by intimidation does not require an intentional mens rea.

This Court's precedent requires an intentional mens rea for crimes of violence. Pet. at 17; *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004). A crime committed negligently or recklessly, therefore, does not qualify as a crime of violence. *Leocal*, 543 U.S. at 12-13. This Court recently acknowledged the import of intentionality in the crime-of-violence context, granting review in *Borden v. United States*, U.S. Case No. 19-5410, to address whether the Armed Career Criminal Act's "use of force" clause encompasses crimes where the intent requirement is that of mere recklessness.[2]

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[2] The government asserts *Borden*'s ultimate holding may not affect Cernak's specific claim and that Cernak has not suggested otherwise. Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 19 n.3). Cernak disagrees with the government's assertions.

Borden is expected to address a question strikingly similar to the question at issue here: What is the mens rea that must exist for a federal "violent felony"? And while the government notes federal appellate courts have found bank robbery by intimidation cannot be committed recklessly or negligently, Cernak explained in his Petition how reckless and negligent intimidation categorically suffices to prove and sustain armed bank robbery convictions and sentences. *Compare* Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 19 n.3 (citations omitted)), *with* Pet. at 10-21. The government does not address Cernak's case analysis on this point. *Borden* may thus very well impact resolution of crime-of-violence mens rea determination at issue in this case, contrary to the government's belief.

Federal bank robbery, 18 U.S.C. § 2113(a), however, "contains no explicit *mens rea* requirement of any kind" and does not require an "intent to steal or purloin." *Carter v. United States*, 530 U.S. 255, 267 (2000). The government agrees that, under *Carter*, federal bank robbery is a general intent crime. Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 16-17). That a federal bank robbery is armed under § 2113(a), (d), does not change the applicable the mens rea; the robbery remains a general intent crime.

The Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have demonstrated agreement that federal armed bank robbery lacks a specific intent mens rea by holding robbery by intimidation focuses on the objective reaction of *the victim*, not on *the accused's* intent. Pet. at 11-21. A victim-focused intent standard does not satisfy this Court's requirement that *the accused* intentionally use, attempt to use, or threaten to use violent physical force. *See Leocal*, 543 U.S. at 12-13.

The government does not dispute a threat is negligently committed when the mental state for criminal liability depends on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks." Pet. at 20 (quoting *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015)); Gov. Br. in Opp. at 18, (incorporating *Johnson*, U.S. Case No. 19-7079 (acknowledging "intimidation is defined at least partly in objective terms of what a reasonable, ordinary person would find intimidating") (cleaned up). Under *Leocal*, a crime that can be committed negligently is not a crime of violence. 543 U.S. at 12-13.

Instead, avoiding the fundamental holdings of *Elonis* and *Leocal*, the government contends federal armed bank robbery by intimidation requires proof the defendant "knew his actions were objectively intimidating," "separat[ing] this offense from crimes of mere negligence," and satisfying § 924(c)(3)(A). Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 18-19 (citations omitted)).

But knowingly engaging in a physical act (such as handing a note to a bank teller requesting money) is not synonymous with having the intent to intimidate someone. The government ignores that mere the physical act satisfies the general intent standard. *See, e.g., 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."); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) ("As intimidation is measured, in this circuit, under an objective standard, whether or not [the defendant] intended to intimidate the teller is irrelevant in determining his guilt."); *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) ("[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . ."); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (permitting jury to "infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation" and explaining "intimidation" is "guided by an objective test focusing on the accused's actions").

This Court should grant certiorari to resolve whether the federal armed bank robbery statute lacks an intentional mens rea and therefore is not a crime of violence under the elements clause of § 924(c)(3)(A), as *Elonis* and *Leocal* instruct.

B. Intimidation does not require the use or threat of violent physical force.

The government fails to meaningfully address Cernak's principle argument that the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits apply a broad, non-violent construction of "intimidation" when determining sufficiency of the evidence to sustain a bank robbery conviction. Pet. at 14-17. These same Circuits ignore their own broad non-violent "intimidation" sufficiency findings when holding "intimidation" always requires a defendant to threaten the use of violent physical force for crime of violence purposes. Pet. at 14-17 (discussing cases). These definitions of "intimidation"—a nonviolent one for sufficiency analysis and a violent one for crime-of-violence analysis—inherently and impermissibly conflict.

This Court's recent decision clarifying the "violent physical force" necessary under § 924(c)(3)(A)'s elements clause underscores the Circuits' and the government's misguided analyses. *Stokeling v. United States*, 139 S. Ct. 544 (2019). In *Stokeling*, this Court found Florida's robbery statute requires "resistance by the victim that is overcome by the physical force of the offender" and thus categorically qualifies under the ACCA's elements clause at 18 U.S.C. § 924(e)(2)(B)(i). 139 S. Ct. at 549, 554. The federal armed bank robbery statute, in contrast, does *not* require a defendant to overcome a victim's resistance.

The government claims that a bank robber's demand for money, alone, constitutes an implicit threat of violence. Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 11). Caselaw does not support this suggestion. As discussed above, an accused need not intend (or even act with knowledge) that his or her conduct would intimidate someone to be convicted under § 2113(a) and (d). The examples of nonviolent robbery by intimidation Cernak provided in his Petition therefore do not satisfy the requirement for "violent physical force" as defined in *Johnson v. United States*, 559 U.S. 133, 140, 144 (2010), and *Stokeling*, 139 S. Ct. 544. Pet. at 10-16. The defendants' conduct in the examples did not demonstrate intended violent physical force, communicated threats of violent physical force, or resistance by anyone.

Furthermore, the government's implicit threat argument permits a mere *presumption* that the accused threatened violence. *See* Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 10-12). Any such presumption would relieve the government of its burden to prove the required element of actual use, attempted use, or threatened use violent physical force beyond a reasonable doubt and thus fail to satisfy the categorical analysis. *See Mathis*, 136 S. Ct. 2248, 2248 (2016) (explaining "elements" are "what the jury must find beyond a reasonable doubt to convict the defendant").

Stokeling reiterated the modifier "physical" in § 924(c)(3)(A) "plainly refers to force exerted by and through concrete bodies—distinguishing physical force, from, for example, intellectual force or emotional force." 139 S. Ct. at 552 (quoting

Johnson, 559 U.S. at 138, 140). While the conduct Cernak cited as examples in his Petition could have been emotionally or intellectually upsetting to robbery victims, the offenses themselves involved no use, attempted use, or threatened use of physical force. The government fails to explain how a non-violent robbery by intimidation could qualify under either *Johnson* or *Stokeling*.

C. The "armed" element of armed bank robbery does not itself create a crime of violence.

The government suggests armed bank robbery categorically satisfies the violent force requirement. Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 12-13, 18-19, 22). This ignores that the Ninth Circuit routinely affirms armed bank robbery convictions not involving real weapons, such as robberies committed with a toy gun. *See* Pet. at 24-25. These convictions rest on this Court's victim-centered analysis, permitting armed bank robbery convictions where the victim's reasonable belief regarding the nature of the item used in the robbery determines if the "weapon" was dangerous or deadly because its display "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986).

Relying on *McLaughlin*, the federal Circuits hold armed bank robbery includes the use of fake guns. "Indeed, every circuit court considering even the question of whether a fake weapon that was never intended to be operable has come to the same conclusion"—that it constitutes a dangerous weapon for the armed robbery statute. *United States v. Hamrick*, 43 F.3d 877, 882-83 (4th Cir. 1995); *see also United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon under § 2113(d)); *United States v. Cruz-Diaz*, 550

F.3d 169, 175 (1st Cir. 2008) (noting "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993) (same); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990) (same).

But the armed element does not require *the accused* to use, attempt to use, or threaten to use a dangerous weapon violently against a victim. The statute can be satisfied where the alleged weapon (even if a toy) makes it more likely a police officer will use force to harm a victim, a bystander, another officer, or even the accused. The risk is that a weapon's presence will escalate the situation, inducing other people to use violent force. *United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir. 1989). A statute does not require "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone *other than* the accused. Given the breadth of the statutory definition of a "dangerous weapon or device," "armed" bank robbery under § 2113(a), (d) does not inherently satisfy § 924(c)'s elements clause.

III. Certiorari is necessary to determine whether "extortion" under the federal armed bank robbery statute requires an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c).

The government does not contest that bank robbery by *extortion* lacks an element of violent physical force. It instead claims extortion is divisible from the other means of committing bank robbery: "by force and violence or intimidation." Gov. Br. in Opp. (incorporating *Johnson*, U.S. Case No. 19-7079, at 23-25). But bank robbery is defined as taking "by force and violence, or by intimidation. . . or . . . by extortion" anything of value from the "care, custody, control, management, or

possession of, any bank." 18 U.S.C. § 2113(a). Cernak otherwise relies on his Petition for his thorough discussion of § 2113(a)'s indivisibility. Pet. at 25-31. Because extortion is indivisible from the other means of committing bank robbery, the armed bank robbery statute does not categorically qualify as a crime of violence.

Conclusion

Sections 2113(a) and (d) do not require an intentional mens rea, nor do they require the use, attempted use, or threatened use of violent physical force. Though federal courts routinely affirm non-violent armed bank robbery convictions on sufficiency-of-the-evidence grounds, these courts continue to find armed bank robbery is a crime of violence on the false assumption that bank robbery by intimidation always requires violent physical force. The resulting conflation amongst the courts requires this Court's guidance.

This case presents a question of exceptional importance for defendants facing mandatory consecutive sentences under 18 U.S.C. § 924(c). For the reasons set forth in his Petition for certiorari, Cernak requests this Court grant his Petition.

Respectfully submitted,

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