No. _____

IN THE
Supreme Court of the United States

FREDERICK DARRINGTON,
Petitioner,
v.

UNITED STATES,
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

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QUESTION PRESENTED

In *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2014), this Court held that the elements clause of 18 U.S.C. §16(a) — which is identical to the 18 U.S.C. § 924(c)(3)(A) elements clause — requires "a higher mens rea than [] merely accidental or negligent conduct." *Id*. The question presented is:

Whether a crime that requires proof of "intimidation" of the victim satisfies the elements clause of 18 U.S.C. § 924(c)(3)(A), when the offense does not require a specific intent to use, or threaten to use, physical force against the person of another?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frederick Darrington respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The district court's order, denying Mr. Darrington's motion to vacate judgment under 28 U.S.C. § 2255 and denying a certificate of appealability, is unpublished and unreported. It is included in Appendix A. The Eighth Circuit's judgment, denying a certificate of appealability, is unpublished and unreported. It is included in Appendix B.

JURISDICTION

The decision of the Court of Appeals, denying a certificate of appealability, was entered on December 15, 2020. Petitioner did not file a petition for rehearing. This Court has jurisdiction under 28 U.S.C. §§ 1254 and 1291.

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . ..

18 U.S.C. § 924(c)(3)

[T]he 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, 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. § 2119, Motor vehicles

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 [be punished as enumerated in the statute].

STATEMENT OF THE CASE

District court proceedings

In 2008, Mr. Darrington was convicted of using a firearm during and in relation to a "crime of violence", in violation of 18 U.S.C. § 924(c). Specifically, the underlying "crime of violence" for the § 924(c) charge was carjacking, in violation of 18 U.S.C § 2119. The district court sentenced Mr. Darrington to 180 months' imprisonment for carjacking, and a 120-month consecutive sentence of imprisonment for the §924(c) conviction (for a total sentence of 300 months' imprisonment).

On June 16, 2020, Mr. Darrington filed a Motion to Vacate Judgment under 28 U.S.C. § 2255 on the basis that, in light of *United States v. Davis*, 139 S.Ct. 2319 (2019), carjacking categorically fails to qualify as a "crime of violence", and therefore Mr. Darrington is now innocent of the § 924(c) offense, and/or his conviction is void. In its response, the government conceded "that *Davis* is a new retroactive rule of

law", which held that the residual clause of § 924(c) is unconstitutionally vague. Gov't response, pg. 3. The only disputed issued below was whether Mr. Darrington's carjacking conviction remained a "crime of violence" under the elements clause of 18 U.S.C. § 924(c)(3)(A). *Id*.

The district court ultimately entered its order on August 20, 2020, denying Mr. Darrington's post-conviction relief motion, and denying the issuance of a certificate of appealability. (Appendix A, pg. 3).

Appeal to the Eighth Circuit

Mr. Darrington sought an application for a certificate of appealability before the Eighth Circuit. It issued its Judgment on December 15, 2020, denying the certificate of appealability, and dismissing the appeal. (Appendix. B, pg. 1.)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the question of whether a crime that requires proof of "intimidation" satisfies the elements clause of 18 U.S.C. § 924(c)(3)(A), when the offense does not require a specific intent to use or threaten physical force against the person of another. This Court has acknowledged this issue is important, by relisting and holding several petitions of certiorari that raise an indistinguishable issue in the context of the federal bank robbery statute, 18 U.S.C. § 2113.[1]

However, the issue is broader than just bank robbery, because other crimes, like petitioner's conviction for carjacking under 18 U.S.C. § 2119, requires proof of the same "intimidation" element. *See Estell v. United States*, 924 F.3d 1291, 1292 (8th Cir. 2019) (analyzing bank robbery, § 2113, simultaneously with carjacking, § 2119, because "both have as an element the use of threatened use of physical force, because each offense must be committed either 'by force and violence' or 'by intimidation.'"); *see also* Eighth Circuit Model Jury Instruction 6.18.2119A, defining "intimidation" in § 2119 identically as in § 2113.

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[1] *See United States v. Rogers*, 19-7320 (last distributed for conference on June 11, 2020); *Blake v. United States*, 19-6354 (last distributed for conference on May 28, 2020); *Johnson v. United States*, 19-7079 (last distributed for conference on May 28, 2020); *Gray v. United States*, 19-7113 (last distributed for conference on September 29, 2020); *Simpson v. United States*, 19-7764 (last distributed for conference on September 29, 2020); *Vidrine, United States*, 19-8044 (last distributed for conference on September 29, 2020); *Velasquez v. United States*, 19-8191 (last distributed for conference on September 29, 2020).

Thus, all the government must prove for a conviction under the "intimidation" element under either the carjacking or bank robbery statute is that the victim subjectively felt intimidated, regardless of "whether or not the [defendant] *actually intended the intimidation*." *See United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (emphasis added). This does not satisfy the elements clause of § 924(c)(3)(A), because "*Leocal* held that offenses that have no *mens rea* component" are not "crimes of violence." *United States v. Torres-Villalobos*, 487 F.3d 607, 615 (8th Cir. 2007), citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2014); *see also Voisine v. United States*, 136 S.Ct. 2272, 2278-9 (2016) (holding that "use" of force requires that the force "be volitional.").

This Court should grant certiorari to resolve this question that is significant because this Court struck down the residual clause of 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague in *United States v. Davis*, 139 S.Ct. 2319 (2019). After *Davis*, these "intimidation" crimes are no longer a "crime of violence" because they fail to satisfy the remaining elements clause of §924(c)(3)(A). This issue is vitally important because it determines whether numerous individuals have been convicted of a crime "that *isn't* criminal", and therefore are currently serving an unconstitutional sentence of up to life imprisonment. *Davis*, 139 S.Ct. at 2335 (emphasis original).

Alternatively, this Court should grant a certificate of appealability to petitioner, and remand this case to the Eighth Circuit for further consideration of this issue.

I. The lower courts are disregarding this Court's holding in *Leocal* — that the elements clause requires a higher mens rea than merely accidental or negligent conduct — when concluding that the "intimidation" element satisfies the elements clause of §924(c)(3)(A).

1. To determine whether a crime satisfies the elements clause of §924(c)(3)(A), *Davis* settled any doubt that the categorical approach applies. 139 S.Ct. at 2334, citing *Leocal*, 543 U.S. at 7; *see also United States v. Ross*, 969 F.3d 829, 837 (8th Cir. 2020) (applying categorical analysis to §924(c)(3)(A)). In this analysis, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

Courts have agreed that not just any force satisfies §924(c)(3)(A), but it must be the use, or attempted use, of "force capable of causing physical pain or injury to another person." *Ross*, 969 F.3d at 838, quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010). Finally, the use of force must be intentional, and not negligent or accidental. *United States v. Begay*, 934 F.3d 1033, 1039 (9th Cir. 2019), citing *Leocal*, 543 U.S. at 9-11; *see also Torres-Villalobos*, 487 F.3d at 615.[2]

2. "Intimidation" in the carjacking and bank robbery statutes does not

[2] In *Borden v. United States*, this Court will decide whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a violent felony under the Armed Career Criminal Act. *See Borden*, 19-5410 (argued November 3, 2020). The outcome of *Borden* is unlikely to impact the question presented because, as highlighted above, "intimidation" element under the carjacking and bank robbery statutes is satisfied by merely negligent or accidental conduct. However, to the extent this Court believes that the merits of this question hinges on the outcome of *Borden*, petitioner asks this Court to hold this petition for certiorari for *Borden*.

require the use or threat of violent physical force, based on circuit court case law that "definitively answers the question." *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).[3] A simple demand for money or property is sufficient to satisfy the "intimidation" element, because "the intimidation element of section 2113(a) is satisfied if the victim could *infer* a threat of bodily harm from the [defendant's] acts, whether or not the [defendant] actually intended the intimidation." *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (emphasis added).

In *Yockel*, the Eighth Circuit affirmed the defendant's conviction for bank robbery even though at trial, it was not disputed that the defendant "did not, at any time, make any sort of physical movement toward the teller and never presented her with a note demanding money [and] never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon." 320 F.3d at 821. To find the element of intimidation, the Eighth Circuit relied, in part, on the defendant's *appearance* when requesting money because the defendant "appeared dirty and had unkempt hair, and eyes that were blackened, as if he had

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[3] "To obtain a conviction under the carjacking statute, 18 U.S.C. § 2119, the government must prove three basic elements: (1) the defendant took or attempted to take a motor vehicle . . . by force and violence or by intimidation; (2) the defendant acted with the intent to cause death or serious bodily harm; and (3) the motor vehicle [traveled interstate]." *United States v. Casteel*, 663 F.3d 1013, 1019 (8th Cir. 2011) (emphasis added), quoting *United States v. Wright*, 246 F.3d 1123, 1126 (8th Cir. 2001). Based on "the least of the acts criminalized" test employed in the categorical analysis, *Moncrieffe* 569 U.S. at 190-91, "intimidation" is the standard courts must analyze in determining whether § 2119 satisfies the elements clause of 18 U.S.C. § 924(c)(3)(B). *Estell*, 924 F.3d at 1293. As highlighted above, the intimidation element of carjacking in § 2119 is indistinguishable from the intimidation element in bank robbery in § 2113. *See supra*, pg. 4.

been beaten." 320 F.3d at 824. But one's appearance, while perhaps relevant to determine whether the government met the statute's standard of "intimidation", cannot satisfy the elements clause because it is based on potentially "accidental or negligent conduct" by the defendant. *Leocal*, 543 U.S. at 11. Critically, in *Yockel*, the panel concluded, "*whether or not Yockel intended to intimidate the teller is irrelevant in determining his guilt*" pursuant to § 2113(a). *Id*. at 824 (emphasis added), citing *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993).

Thus, there is a body of circuit court caselaw where bank robbery convictions have been affirmed under §2113 because it satisfied the "intimidation" element of the crime, even though the government did not prove that the defendant knowingly made even a threat of violent force. To give another example, wearing a "fanny pack" was found threatening in affirming a bank robbery conviction under §2113, in *United States v. Smith*, based on a teller's mere speculation that the fanny pack "may contain a weapon." 973 F.2d 603, 604 (8th Cir. 1992). To find "intimidation" that caused "fear", the Eighth Circuit in *Smith* also relied on the fact that defendant stated he wanted to make a "withdrawal", acted "real fidgety", and at one point put his elbows up on the window and leaned close to the teller. *Id.* at 603-04.

The Fourth, Ninth, and Eleventh Circuits have similarly interpreted the "intimidation" element of the crime. *See United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005), citing *Yockel,* 320 F.3d at 824) ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating."). In

Kelly, the Eleventh Circuit concluded there was sufficient evidence for a bank robbery conviction when, after the teller stepped away from her station, the defendant jumped on top of the counter to grab the cash and ran away without saying anything to anyone. *Id*.; *see also Woodrup*, 86 F.3d at 364 ("[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. . . . [N]othing in the statute even remotely suggests that the defendant must have intended to intimidate."); *see also Foppe*, 993 F.2d at 1451 (the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent because "[w]hether [the defendant] specifically intended to intimidate [the teller] is irrelevant.").

The Eighth Circuit in *Yockel* — as well as other circuits — have read this Court's holding in *Carter v. United States* as not to require a "specific intent as an element of the [bank robbery] offense", but instead "requires only 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).'" *Yockel*, 320 F.3d at 823 (emphasis original), quoting *Carter v. United States*, 530 U.S. 255, 267 (2000) (holding that bank larceny, § 2113(b), is not a lesser-included offense of robbery in § 2113(a)). This is further why these "intimidation" crimes do not satisfy the elements clause because they are general

intent crimes that does not require "a higher mens rea than [] merely accidental or negligent conduct." *Leocal*, 543 U.S. at 11.[4]

3. Since *Davis* was handed down by this Court, the Eighth Circuit, as well as other circuits, have improperly concluded that the "intimidation" element of bank robbery and carjacking crimes remains a "crime of violence" because it satisfies the elements clause of §924(c)(3)(A). *See Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019); *see also United States v. Runyon* ____ F.3d ____ 2020 WL 7635761, *3 (4th Cir. December 23, 2020); *Ovalles v. United States*, 905 F.3d 1300, 1304 (11th Cir. 2018) (en banc). These courts have failed to explain how the "intimidation" element requires "a higher mens rea than [] merely accidental or negligent conduct", as required by the elements clause of § 924(c)(3)(A). *Leocal*, 543 U.S. at 11.

Specifically, the Eighth Circuit concluded that "even though bank robbery by intimidation does not require a specific intent to intimidate, *see United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003), it still constitutes a threat of physical force because 'threat,' as commonly defined, speaks to what the statement conveys—not to the mental state of the author." *Estell v. United States*, 924 F.3d at 1293 (citations and quotations omitted). But *Estell* failed to address the central

[4] At least one circuit has questioned whether this line of case law is sound after this Court's holding in *Carter*. *See United States v. Ellison*, 866 F.3d 32, 39 (1st Cir. 2017) (concluding that the court did "not see how *Yockel* can be squared with *Carter*"). Whether *Yockel* properly interpreted *Cater* is of no significance for this Court's categorical analysis, because in the Eighth Circuit (and other circuits like it), this has been "least of the acts criminalized" for at least two decades, including when petitioner was convicted in 2008. *Moncrieffe*, 569 U.S. at 190-91.

question of whether the defendant intended to threaten the use physical force under §924(c)(3)(A). *Leocal*, 543 U.S. at 11. *Estell* just reinforces how lower courts are improperly analyzing the elements clause, by refusing to analyze "the mental state of the [defendant]." *Estell*, 924 F.3d at 1293.[5]

This disregard of this Court's seminal holding in *Leocal* requires this Court's intervention, precisely because this Court has repeatedly emphasized the importance of *Leocal*. *Leocal* was central to this Court's recent ruling in *Davis*, striking down §924(c)(3)(A). *Davis*, 139 S.Ct. at 2327-8, quoting *Leocal*, 543 U.S. at 7 (highlighting that *Leocal* "in a unanimous opinion, has already read the nearly identical language" to reject the government's position). *Leocal* has also been the guiding principle for this Court's analysis of other similar elements clauses like §924(c)(3)(A). *See Voisine v. United States*, 136 S.Ct. 2272, 2279-80 (2016) (quoting

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[5] Other circuits, like the Eleventh Circuit, have avoided addressing this issue by attempting to expand the force element of the carjacking offense in § 2119. *Ovalles*, 905 F.3d at 1303-04. In *Ovalles*, the Eleventh Circuit took two distinct elements of the carjacking offense, and combined them into one singular element when determining if it satisfied the elements clause of §924(c)(3)(A). *Id.* "The term 'by intimidation' in the carjacking statute cannot be read in isolation, but must be considered along with the requisite intent, which means the intimidating act was conducted 'with the intent to cause death or serious bodily harm.'" *Id*.

But the "intimidation" prong of the test, alone, provides the force to commit carjacking, and therefore is dispositive of the elements clause analysis. The second prong of the test, the defendant's intent to cause death or serious bodily harm, is irrelevant to the elements clause of §924(c)(3)(A) because it requires a "conditional intent." *Holloway v. United States*, 526 U.S. 1, 11–12 (1999). A defendant's "conditional intent" cannot satisfy the elements clause based on *Leocal* because it is far too abstract. *Id.* at 13-22 (Scalia, J., dissenting) ("carjacker who hopes to obtain the car without inflicting harm is covered" under carjacking statute, "sending courts and juries off to wander through 'would-a, could-a, should-a' land").

Leocal when interpreting what constitutes a misdemeanor crime of domestic violence); *United States v. Castleman*, 572 U.S. 157,170-71 (2014) (same); *United States v. Johnson*, 559 U.S. 133, 140 (2010) (quoting *Leocal* when interpreting the Armed Career Criminal Act's elements clause).

Simply put, the lower courts have failed to explaine how the "intimidation" element satisfies the mens rea test of *Leocal*, and for good reason because it does not based on case law that has repeatedly lowered the bar to sustaining criminal convictions under § 2113 and § 2119. *Yockel,* 320 F.3d at 824; *Kelley*, 412 F.3d at 1244; *Woodrup*, 86 F.3d at 364. That caselaw cannot be disregarded when it comes to the categorical analysis, because, again, it "definitively answers the question" of whether "intimidation" satisfies the elements clause. *Mathis*, 136 S. Ct. 2243.

II. This Court's intervention is necessary to resolve this important question. Petitioner's case is an excellent vehicle to resolve this question.

This question is important because its resolution is necessary to ensure that defendants are not serving unconstitutional and illegal sentences after *Davis*. "In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty." *Davis*, 139 S.Ct. at 2335. That holding in *Davis* can be traced directly back to Justice Scalia's landmark opinion that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Johnson v. United States*, 135 S.Ct. 2551, 2561 (2015)*; see Davis*. 139 S.Ct. at 2325-6, citing *Johnson*.

The question presented is important because it implicates both reasons why *Davis* and *Johnson* were such significant decisions. *First*, it implicates the "prospect of additional 'time behind bars [which] is not some theoretical or mathematical concept." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018), quoting *Barber v. Thomas,* 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting). "'Any amount of actual jail time' is significant, *Glover v. United States,* 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001), and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles*, 138 S.Ct. at 1907.

Here, the prospect of additional incarceration for petitioner (and numerous others inmates) is not merely a matter of months, because convictions under §924(c) carry punitive mandatory minimum sentences from five, seven, or ten years' imprisonment, up to life imprisonment. *See* 18 U.S.C. § 924(c)(1)(A)(i), (ii), and (iii). What is more, the punishment under § 924(c) *must* be served consecutively to the "crime of violence." *Id.* Finally, before the First Step Act of 2018, successive § 924(c) convictions had to be "stacked", "requiring a minimum prison sentence of five years for the first [of the defendant's] § 924(c) convictions and consecutive twenty-five year prison sentences thereafter for each of his 'second or subsequent' § 924(c) convictions" *United States v. Rivera-Ruperto*, 884 F.3d 25 (1st Cir. 2018) (161 year and ten-month sentence affirmed based on "stacked" § 924(c) convictions). Thus, the question presented is important because it will determine whether numerous

individuals continue to serve lengthy sentences that should not have been imposed in the first place.

Second, the question presented here is also important because it does not just pertain merely to unfair or erroneously imposed sentences — it pertains to sentences that violate "the Constitution because it was based on [an] unconstitutionally vague residual clause." *Cravens v. United States*, 894 F.3d 891, 893 (8th Cir. 2018) (distinguishing between mere Guidelines sentencing errors and sentences predicated on an unconstitutionally vague residual clause in granting post-conviction relief). *Johnson* addressed an important issue regarding defendants who had been validly convicted, but were serving sentences that exceeded the statutory maximum. *Johnson,* 135 S.Ct. at 2561. But this question implicates something potentially even more important, whether numerous individuals have been convicted and sentenced to a crime "that *isn't* criminal." *Davis*, 139 S.Ct. at 2335 (emphasis original).

Some circuits have realized that certain crimes are no longer a crime of violence after *Davis* because they do not satisfy the elements clause. *See, for example, United States v. Taylor*, 979 F.3d 203, 209 (4th Cir. 2020) (concluding that attempted Hobbs Act robbery is not a crime of violence under §924(c)(3)(A), because "by passing a threatening note to a store cashier has attempted the planned robbery without using or attempting to use physical force"); *see also United States v. Baldon*, 956 F.3d 1115, 1124 (9th Cir. 2020) (concluding that California carjacking is not a crime of violence under the Sentencing Guidelines' elements clause).

But this Court's intervention is necessary to correct this mistake in the law, because no known circuit has concluded that federal carjacking is no longer a crime of violence after *Davis*. *See United States v. Runyon*, ____ F.3d _____ 2020 WL 7635761, *4 (4th Cir. December 23, 2020). This mistaken understanding of the law has been a failure of "groupthink", encouraged by the government to perpetuate the improper application of the elements clause after *Davis*. *See* government's response to petitioner's § 2255 petition, filed in the district court filed on 07/21/20, string citing to adverse opinions nationwide. However, this would not be the first time that lower courts are collectively misinterpreting the law, necessitating this Court's intervention. *See Rehaif v. United States*, 139 S.Ct. 2191 (2019) (holding that government must prove that the individual knew he had prohibited status to be convicted under statute prohibiting possession of the firearm, notwithstanding that every lower circuit court had concluded to the contrary); *Johnson*, 135 S.Ct. at 2561 (holding that the Armed Career Criminal Act's residual clause was unconstitutionally void, notwithstanding that every lower circuit had concluded to the contrary).

Finally, petitioner's case is an ideal vehicle to resolve this question, because it was squarely raised and ruled on below. Specifically, no vehicle issues exist that would prevent this Court from reaching the merits of the question. Petitioner's case also demonstrates why this Court should act now to resolve this grievous mistake in the law. Petitioner filed his § 2255 in the district court within a year after this Court decided *Davis*, as required as a matter of law. *See* 28 U.S.C. § 2255(f)(3).

Accordingly, even if the lower courts were to resolve this mistake in the law in the coming years, it would not assist Mr. Darrington, or the countless others who convictions and sentences currently rest on an unconstitutionally void residual clause after *Davis*. Those individuals must receive relief now based on the "newly recognized" right in *Davis, id* at § 2255(f)(3), or they will remain condemned to lengthy mandatory prisons sentences based on a "vague law [that] is no law at all." *Davis*, 139 S.Ct. at 2323.

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This Court took action in *Davis* to prevent "the vast majority of federal felonies becoming potential predicates for § 924(c) charges, contrary to the limitation Congress deliberately imposed when it restricted the statute's application to crimes of violence." 139 S.Ct. at 2332. This Court's intervention is again necessary to ensure that § 924(c)(3)(A) does not become just another default provision for the majority of federal felonies to serve as predicates. As Chief Justice Rehnquist wrote, "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence'", and that provision cannot "encompass accidental or negligent conduct" because it "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment." *Leocal*, 543 U.S. at 11.

For all of these reasons, the petition for certiorari should be granted.

III. Alternatively, this Court should grant a certificate of appealability.

This Court should grant a certificate of appealability, because petitioner's case presents a constitutional as to whether his conviction and sentence under 18 U.S.C.

§ 924(c) is unconstitutional based after this Court struck down the residual clause of §924(c)(3)(B). *Davis*. 139 S.Ct. at 2335. For the reasons highlighted above, the question of whether a crime that requires proof of "intimidation" satisfies the elements clause of 18 U.S.C. § 924(c)(3)(A) is debatable amongst jurists, because it does not require a specific intent to use or threaten physical force against the person of another. Specifically, this question is debatable because, to give just one example, this Court is currently considering this question in numerous pending petitions for certiorari that have been relisted by this Court. *See supra*, fn 1.

A certificate of appealability ("COA") must issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch v. United States*, 136 S.Ct. 1257, 1263–64 (2016), quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 1263-64, quoting *Miller–El v. Cockrell,* 537 U.S. 322, 337 (2003).

A COA should be granted in this matter because petitioner made a substantial showing of the denial of a constitutional right. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000). That is, Mr. Darrington has demonstrated that the question is debatable among reasonable jurists, a court could resolve the issues

differently, and/or that the issues deserve further proceedings. *Id*. Accordingly, this Court should grant a COA.

Regarding the first part of the COA standard, Mr. Darrington's claim involves a denial of his constitutional right to due process because *Davis* held that convicting a defendant under the residual clause of § 924(c)(3)(A) sentence violates due process of law. *Davis*. 139 S.Ct. at 2335. Since that is the basis for Mr. Darrington's § 924(c) conviction, his conviction and sentence violate his constitutional right to due process. With regard to the second part of the COA standard, the substance of Mr. Darrington's claim is debatable among reasonable jurists for the reasons highlighted above (that will not needlessly be repeated herein in Section III). Accordingly, the Court should issue a certificate of appealability in compliance with 28 U.S.C. § 2253(c)(1), and remand this matter to the Eighth Circuit to allow further proceedings on this issue.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Darrington respectfully requests this Court grant his petition for certiorari. Alternatively, Mr. Darrington asks that the Court reverse the Eighth Circuit's opinion that refused to grant a certificate of appealability, vacate the judgment, and remand to the United States Court of Appeals for the Eighth Circuit to issue the certificate of appealability.

Respectfully submitted,

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APPENDIX

Appendix A – District court's order denying motion to vacate

Appendix B – Judgement of the Eighth Circuit Court of Appeals