No. 20-6840

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Dan Goldberg
Counsel of Record
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Tel: (816) 471-8282
Dan_Goldberg@fd.org

TABLE OF CONTENTS

Page

Table of Authorities

Cases

Statutes

REPLY BRIEF FOR PETITIONER

The government is concerned that federal "intimidation" carjacking and bank robbery crimes do not satisfy the elements clause of 18 U.S.C. § 924(c)(3)(A), and therefore are no longer "crimes of violence" after this Court's holding in *United States v. Davis*, 139 S.Ct. 2319 (2019). Were it confident that these "intimidation" crimes were "crimes of violence", the government would have analyzed petitioner's cases that demonstrate a "realistic probability" that these "intimidation" crimes are not based on "the least of the acts criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), quoting *Johnson v. United States,* 559 U.S. 133, 137 (2010).

The government instead heavily relies on a separate "conditional" mens rea element that is only "if necessary" to commit the carjacking, i.e. *if* the "driver resisted." *Holloway v. United States*, 526 U.S. 1, 8 (1999). But this Court has never held that a conditional mens rea satisfies the elements clause that, by its plain text, requires the unconditional "*use* of physical force" § 924(c)(3)(A) (emphasis added). The government simply fails to explain how such abstractions satisfy that test. *See Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) ("Evaluating the statistical probability that harm will befall a victim is not an administrable standard under our categorical approach").

Finally, the government's vehicle argument regarding the plea agreement was not only waived below, but more importantly cannot prevent petitioner (or others similarly situated) from obtaining relief when convicted of a crime "that *isn't* criminal", based on its plain terms. *Davis*, 139 S.Ct. at 2335 (emphasis original).

1. The government's primary argument as to why the petition for certiorari should be denied is not a merits argument, but instead a regurgitation of the status quo that "intimidation" carjacking and robbery crimes have been held by the lower courts to be a "crime of violence." BIO 7-11 (string citing cases). But this just proves petitioner's point that only this Court's intervention can correct this mistake in the law. And the government does not dispute that the lower courts, at least sometimes, collectively get the law wrong. Pet 15 (citing to *Rehaif* and *Johnson*).

This Court has not had occasion to interpret the elements clause of 18 U.S.C. § 924(c)(3)(A) since it struck down the residual clause of §924(c)(3)(B) as unconstitutional in *Davis*. 139 S.Ct. at 2323. This is significant because in *Davis* all members of this Court agreed that some federal offenses (including carjacking and robbery) may no longer qualify as a "crime of violence" without relying on the now void residual clause. *Davis*. at 2335, citing to dissenting opinion at 2336-2337, 2352-2355. Yet the government assumes that the state of the law before *Davis* is forever set in stone. Ultimately, the government has no explanation for why this Court would still hold a swath of petitions for certiorari from last term that present a similar question presented, if this Court had no interest in re-evaluating this area of the law. Pet. fn 1.

When the government does reach the merits of petitioner's argument, it attempts to distinguish *Leocal* based on its facts (that it involved a statute that penalized drunk driving resulting in serious bodily injury). BIO 11-12. But as pointed out by petitioner, this Court has repeatedly relied on its unanimous holding

in *Leocal* that the elements clause requires "a higher mens rea than [] merely accidental or negligent conduct." *Leocal*, 543 U.S. at 1, in a variety of legal contexts. Pet 11-12 (citing to *Voisine*, *Castleman*, *Johnson*). The government argues that the carjacking statute "does not criminalize the *kind* of negligent or accidental conduct" as in *Leocal*. BIO 12 (emphasis added). But this type of hairsplitting has been questioned by this Court and other courts in the past. *See* oral argument transcript in *Borden v. United States*, 19-5410, pg. 45-46 (J., Breyer) (inquiring of the government whether there is a difference between "reckless murder with a car" and "drunk driving."); *see also United States v. Torres-Villalobos*, 487 F.3d 607, 615 (8th Cir. 2007) ("Under Minnesota law, a person can commit second-degree manslaughter without using force or risking the intentional use of force").

As already pointed out, the Eighth Circuit, and many other circuits, have relied solely on the "intimidation" element of carjacking crime in concluding it satisfies the elements clause. Pet. 8-12, citing *Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019). The government maintains that "[a] defendant cannot be convicted of bank robbery under Section 2113(a) or carjacking under Section 2119 unless he knowingly or purposely uses force or the threat of force to obtain property." BIO pg. 13. But the government's analysis is simply not supported by the "least of the acts criminalized" test in *Moncrieffe* and *Johnson*. Pet. 6, 10.

The case law — that establishes a "realistic probability" that these "intimidation" crimes do not satisfy the elements clause — has already been highlighted. Pet. 7-9. To briefly summarize, in *United States v. Yockel*, the

defendant's conviction for bank robbery was affirmed even though he did not "make any sort of physical movement toward the teller and . . . did not appear to possess a weapon." 320 F.3d 818, 821 (8th Cir. 2003). But to find the element of intimidation, *Yockel* relied on the defendant's *appearance* when requesting money because the defendant "appeared dirty and had unkempt hair. . . ." *Id* at 824; s*ee also United States v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992) (defendant engaged in "conduct reasonably calculated to put another in fear" during robbery, by wearing a "fanny pack" that caused teller to speculate that it "may contain a weapon.").

Thus, to sustain a conviction under the "intimidation" element under either the carjacking or bank robbery statute, it is irrelevant "whether or not the [defendant] actually intended the intimidation." *Yockel*, 320 F.3d at 824. Of course, this is problematic because the elements clause requires a specific mens rea to use force under *Leocal*. *See also Voisine v. United States*, 136 S.Ct. 2272, 2278-9 (2016) (holding that "use" of force requires that the force "be volitional").

The government has refused to meaningfully respond to Mr. Darrington's elements clause analysis based on *Yockel* and *Smith*, notwithstanding that petitioner demonstrated it "definitely answers the question" of whether "intimidation" crimes satisfy the elements clause. Pet. 12, quoting *Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016) (relying on one case to answer question presented). Just recently, this Court, in determining whether Florida's robbery statute satisfied the elements clause, analyzed numerous Florida cases cited by the defendant to determine the least culpable conduct before reaching its conclusion it

required violent force. *See Stokeling*, 139 S.Ct at 555.

The closest the government comes to addressing *Yockel* and *Smith* (and other cases relied on by petitioner) is to maintain those courts have subsequently clarified the law so that "the lack of a specific-intent requirement does not mean that a defendant may be convicted if he only negligently intimidated the victim." BIO, pg. 15, citing *Estell*, 924 F.3d at 1293. But the Eighth Circuit has never made such a proclamation, and instead still maintains *Yockel* was correctly decided "because 'threat,' as commonly defined, speak[s] to what the statement conveys—not to the mental state of the author." *Estell*, 924 F.3d at 1293. Furthermore, as already pointed out by petitioner, even had *Estell* changed the law in 2019, *Yockel* has been the "least of the acts criminalized" for at least two decades, including when petitioner was convicted in 2008. Pet. 10, quoting *Moncrieffe*, 569 U.S. at 190-91.

The government attempts to circumvent all of this not by maintaining that the intimidation element satisfies the elements clause, but instead by arguing that "the intimidating act was conducted with intent to cause death or serious bodily harm." BIO, pg. 12. Petitioner has explained that the defendant's conditional intent to cause death or serious bodily harm is irrelevant to the elements clause because it does not require the use, attempted use, or threatened use of physical force. *See infra,* pg. 1; Pet. 11. While the government maintains that petitioner's argument is not "meaningfully develop[ed]", BIO 12-13, it is the government that fails to explain how two different elements of a crime may be combined under the elements clause test, or how a conditional intent can satisfy this Court's elements clause test based

on *Stokeling* and *Johnson*.

Specifically, the government does not dispute that the "conditional intent" need not be communicated to the victim, and instead is based only on conditional thoughts, i.e. "if that action had been necessary to complete the taking of the car." *Holloway*, 526 U.S. at 11. Thus, the government cannot demonstrate that §2119 satisfies the elements clause by, for example, categorically requiring the use of force "sufficient to overcome a victim's resistance." *Stokeling*, 139 S.Ct. at 548.

To further understand why this conditional intent cannot satisfy the elements clause, one must turn back full circle to the least culpable conduct case examples of *Yockel* and *Smith,* where the Eighth Circuit relied solely on the defendant's appearance to find him guilty. Petitioner has shown that the Eighth Circuit is not alone. Pet, pg. 8-9 (citing to cases in the Fourth, Ninth and Eleventh Circuits holding that a defendant can be convicted of an intimidation crime even if he did not intend for an act to be intimidating). Thus, no amount of revisionist history can change what the law was when petitioner was convicted of §2119, and that crime is no longer is a "crime of violence" after *Davis*.

Finally, on the merits, the government does not take issue with why this question is exceptionally important. Pet. 12-14. "In our republic, a speculative possibility that a man's conduct violated the law should never been enough to justify taking his liberty." *Davis*, 139 S.Ct. at 2355. The government's attempts reshape the "least culpable conduct" necessary to be found guilty of carjacking in the Eighth Circuit is exactly the type of "speculative possibility" that cannot sustain

a defendant's sentence under §924(c). *Id.* To conclude otherwise, would render the holding of *Davis* meaningless.

2. The government's argument that this case is an unsuitable vehicle — solely because petitioner entered into a plea agreement — need not detain this Court. BIO, pg. 16-17. Specifically, the government neglects that the appeal waiver is inapplicable by its terms to "a sentence imposed in excess of the statutory maximum or an illegal sentence." DCD 95, pg. 11. Petitioner's argument is that he was sentenced to a crime, Count Five of the Indictment, "that *isn't* criminal" after *Davis*. 139 S.Ct. at 2335 (emphasis original). The plea waiver, by its plain language, would therefore not apply to petitioner's case if his petition for certiorari were granted by this Court. *See United States v. Heikes*, 525 F.3d 662, 663-4 (8th Cir. 2008) (plea waiver not enforced because defendant was sentenced to an illegal sentence five years above the statutory maximum); *see also DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000) (defendants cannot waive their right to appeal an illegal sentence).

But if the government wishes to litigate this novel issue on remand, it could attempt to do so. *See Welch v. United States*, 136 S.Ct. 1257, 1268 (2016) (reaching the merits of the question presented as to whether *Johnson* was retroactive although "the parties continue to dispute whether Welch's strong-arm robbery conviction qualifies as a violent felony . . . which would make Welch eligible for a 15–year sentence regardless of *Johnson*."). Ultimately, because the question

presented is vitally important, this Court should not be distracted by vehicle arguments that are unlikely to prevail on remand.

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,

/s/ Dan Goldberg
DAN GOLDBERG
Counsel of Record
Federal Public Defender's Office
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Dan_Goldberg@fd.org
(816) 471-8282