No. 20-7235

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL ALVAREZ,

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'S REPLY BRIEF

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO*
Assistant Federal Defender
2300 Tulare Street, Suite 330
Fresno, California 93721
(559) 487-5561
Peggy_Sasso@fd.org
*Counsel of Record for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

CASES (*Cont'd*)

STATUTES

MISCELLANEOUS

PETITIONER'S REPLY BRIEF

"[W]ords are how the law constrains power," *Niz-Chavez v. Garland*, No. 19-863, __S. Ct.__, 2021 U.S. LEXIS 2232, at *27 (Apr. 29, 2021), and when the governing statute includes the limiting language, "against the person of another," the government lacks the power to impose draconian penalties on individuals without proof that when the defendant used force he was aware that his conduct might harm another.

The government's Brief in Opposition ("BIO") is premised on refuting two arguments that Mr. Alvarez did not make, evincing a fundamental lack of understanding of the legal issue presented. BIO at 2. Notwithstanding the government's contention to the contrary, Mr. Alvarez's argument has nothing to do with whether federal bank robbery is "a specific-intent crime," nor does it contend that bank robbery does not involve intentional conduct that results in harm to another, which in the case of bank robbery by intimidation involves intentional conduct by the defendant that reasonably results in others perceiving a threat of bodily harm. *Id*.

In sharp contrast to the government's reframing of the issue presented, the core of Mr. Alvarez's argument is that the Ninth Circuit—and the government—are treating the statutory language "against the person of another" as mere surplusage when they truncate the analysis by looking solely at an individual's intentional conduct without inquiry into whether the individual was aware that his conduct could result in harm to another, and in so doing are running roughshod over this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

I. The Government's Failure to Appreciate the Significance of *Borden v. United States* (Case No. 19-5410) Is Revealing.

Just as the government attempted to do in *Borden*, the government here wants to focus on the resulting harm—that an ordinary bank teller perceived a bank robber's conduct as intimidating—and extrapolate from there that the conduct the bank robber committed had a serious potential for danger, *i.e.*, contained an "implicit threat" of harm, and thus should qualify as a crime of violence that strips judges of their sentencing discretion. BIO at 2 (relying on *Johnson* BIO 11-12). While that analysis might have worked under the residual clause, this Court struck down the residual clause as unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019); *c.f.*, *Stokeling v. United States*, 138 S. Ct. 544, 564 n.2 (2019) (Sotomayor, J., dissenting) (cautioning against "nostalgia for the residual clause" leading to jurisprudential "confusion in the lower courts"). The government's argument in this case, and in *Borden*, sound in precisely this nostalgia—and so do the circuit courts' decisions holding that bank robbery is a crime of violence.

In both the *Johnson* BIO the government relies on here, as well as at oral argument in *Borden*, the government revived the very argument this Court rejected in *Leocal*, contending that even when a statute contains the limiting language "against the person of another" the analysis is limited to simply the defendant's intentional use of force regardless of his awareness that his conduct could result in harm to another—hardly a metric for narrowing the class of defendants to capture only those people "who might deliberately point the gun and pull the trigger," *Begay v. United States*, 553 U.S. 137, 145-46 (2008), overruled on other grounds by

Johnson v. United States, 576 U.S. 591, 600 (2015).

Notably, at oral argument in *Borden*, this Court repeatedly challenged the government's truncated analysis that effectively renders individuals strictly liable for the draconian sentencing enhancement under 18 U.S.C. § 924(e) and § 924(c) without proof that they were aware their conduct could result in harm to another so long as they intentionally engaged in forceful conduct. *See, e.g.*, *Borden*, No. 19-5410, Tr. of Oral Arg. (Nov. 3, 2020), at 57 (Justice Gorsuch observing that pursuant to *Leocal*, when the statute contains the limiting language "against the person of another," the government's reliance solely on "use" of force seems "too narrow"); *Id*. at 51 (Justice Alito querying whether *Leocal* permits the Court "to say that. . . 'against the person of another' does not speak at all to the question of *mens rea*"); *Id*. at 43-44 (Justice Breyer opining that when draconian sentencing statutes are at issue "*Leocal* and *Begay* [are] pretty much on point" to narrow the reach of those statutes to capture only the most culpable); *Id*. at 51 (Justice Sotamayor noting that previously the government had recognized that "the 'against' phrase was crucial to *Leocal*'s position, but now seemed to be arguing that the phrase "has no meaning").

Based on the oral argument, *Borden* will almost certainly clarify whether, contrary to the government's position here and in *Borden*, the Court meant what it said in *Leocal*—when a statute, such as 18 U.S.C. 924(c) contains the limiting language "against the person of another," a qualifying offense must require proof that the defendant was aware that his use of force could result in harm to another.

Nevertheless, relying on a BIO written six months *before* oral argument in *Borden*, the government fails to see the relevance of *Borden*. BIO at 2.

II. Where the Government Fails to Cite a Single Case for the Proposition that a Conviction Under 18 U.S.C. § 2113(d) Requires Proof that a Defendant Was Aware that His Conduct Could be Perceived as a Threat of Physical Harm Against Another, Pursuant to *Leocal v. Ashcroft*, Armed Bank Robbery Cannot Qualify as a Crime of Violence Under 18 U.S.C. § 924(c)(3)(A).

The government's BIO makes Mr. Alvarez's point for him when it cites *United States v. Williams*, 864 F.3d 826, 828 (7th Cir. 2017) for the proposition that for purposes of 18 U.S.C. § 2113, "[i]ntimidation means the threat of force and exists when a bank robber's words and actions would cause an ordinary person to feel threatened, by giving rise to a reasonable fear that resistance or defiance will be met with force," and *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016) for the proposition that the requisite intimidation is established so long as a "bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force." *Johnson* BIO 9-10. After confirming that a conviction for bank robbery by intimidation does not require proof that the defendant was aware that his conduct could be perceived as intimidating, the government makes the untenable leap that there is thus "'no 'space' between 'bank robbery' and 'crime of violence.'" *Id*. at 10 (quoting *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991).

There is only "no space" between federal bank robbery and a definition of a crime of violence that includes the limiting language "against the person of another," if one disregards this Court's reasoning in *Leocal*. Indeed, the Court in

Leocal explicitly chastised the government for simply looking at the defendant's use of force without inquiry into whether the conviction required proof that the defendant was aware of how his conduct might impact another when he acted. *Leocal*, 543 U.S. at 9. Yet that is exactly what the government continues to do in *Borden* (Tr. of Oral Arg., at 43, 48, 58) and here (*Johnson* BIO, at 9-12), focusing only on the resulting injury or the perception of a threat by another, irrespective of whether the defendant had any awareness that his conduct could result in harm to another.

Critically, the government does not cite to a single case for the proposition that in order to secure a conviction under § 2113(d), it has to prove that the defendant was aware that his conduct could be perceived by another as a threat of physical harm.[1] Where the requisite analysis is limited to the elements of the

[1] Instead the government simply cites to the very circuit court cases that Mr. Alvarez challenges for their failure to both limit their analysis to the elements of the offense as required by *Mathis* and to follow *Leocal*'s admonition that the limiting language "against the person of another" requires proof that when the defendant acted he was at least negligent regarding the possibility that his conduct could be perceived as a threat of violent physical force against another. *Johnson* BIO at 7-8 (citing, among other cases, *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir. 2016) (clarifying that "the intimidation element of § 2113(a) is satisfied if *an ordinary person in the teller's position reasonably could infer* a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation") (emphasis added); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) ("Intimidation concerns whether an *ordinary person would feel threatened under the circumstances*") (emphasis added);*United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) (intimidation "requires that the defendant take property in such a way that would put *an ordinary, reasonable person in fear of bodily harm*") (emphasis added); *United States v. McCraine*, 889 F.3d 677, 680 (10th Cir. 2018) (citing the Tenth Circuit Criminal Pattern Jury Instructions for the proposition that "intimidation" merely requires a defendant "to say or do something

offense, that failure is dispositive. *United States v. Mathis*, 136 S. Ct. 2243, 2252 (2016). Contrary to the government's results-based analysis, the analysis under 18 U.S.C. § 924(c)(3)(A) is limited to what elements the government was actually required to prove beyond a reasonable doubt to secure a conviction, *id.*, and specifically whether, as is relevant here, said elements required the government to prove beyond a reasonable doubt that the defendant necessarily *threatened* the use of physical force against another. § 924(c)(3)(A). The issue, therefore, is what the defendant actually understood he was doing, not what *resulted* from the defendant's conduct.

In other words, when it comes to stripping judges of their sentencing discretion because someone is such a danger to the community, the issue is not whether someone perceived the defendant's conduct as threatening, but whether the defendant was at least aware that his conduct would be perceived by others as a threat of violent physical force against them and acted anyway. Because a defendant can be convicted of violating § 2113 without the government having to prove beyond a reasonable doubt that the defendant was aware that his conduct could be perceived as a threat of violent physical force against another, he lacks the awareness—*mens rea*—required by *Leocal*, and thus bank robbery is not a categorical match for § 924(c)(3)(A).

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in such a way that *a person of ordinary sensibilities would be fearful of bodily harm*") (emphasis added)).

Where the circuit courts have unanimously abandoned the requisite elements-based approach in favor of a results-based analysis that harkens back to the unconstitutional residual clause, urgent action is needed by this Court to (1) reaffirm that it meant what it said in *Mathis*, 136 S. Ct. at 2252—"consistent with the Sixth Amendment," the categorical analysis is limited to "what crime, with what elements, the defendant was convicted of"—and (2) reaffirm that it likewise meant what it said in *Leocal,* 543 U.S. at 9—when the statutory definition of a crime of violence includes the limiting language "against the person of another," it is not enough that the defendant used physical force, he must have at least been aware that his conduct could result in harm to another or be perceived by another as a threat of physical force against them.

CONCLUSION

For all the above reasons, together with those presented in the petition, this Court should grant Mr. Alvarez's petition for a writ of certiorari.

Dated: May 7, 2021

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO
Assistant Federal Defender
Eastern District of California
Counsel of Record for Petitioner
2300 Tulare Street, Suite 330
Fresno, CA 93721
(559) 487-5561
peggy_sasso@fd.org