No. _____

In the

SUPREME COURT OF THE UNITED STATES

_____

KEVIN REID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

_____

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit
Petition for Writ of Certiorari

_____

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QUESTIONS PRESENTED

1. Whether attempted robbery under the Hobbs Act, 18 U.S.C. § 1951, qualifies as a "crime of violence," meaning that it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," *id.* § 924(c)(3)(A).

2. Whether a conviction must necessarily establish that a defendant was more than negligent as to whether his intentional conduct could harm another before said conviction can serve as a predicate under § 924(c)(3)(A) or whether, as the Ninth Circuit's analysis assumes, the limiting language "against the person of another" in 18 U.S.C. § 924(c)(3)(A) is mere surplusage?

RELATED PROCEEDINGS AND CASES

Mr. Reid's related proceedings include:

1. *United States v. Reid, et al*., No. 2:99-cr-00358-LKK (July 27, 2000 ED CA) (criminal judgment against Kevin C. Reid)

2. *United States v. Reid, et al*., No. 2:99-cr-00358-GEB AC (July 19, 2019 ED CA) (order and judgment denying motion to vacate, set aside or correct Sentence under 28 U.S.C. § 2255)

Cases related to Mr. Reid that are before this Court include:

1. *Dominguez v. United States*, No. 20-1000 (certiorari petition filed Jan. 21, 2021)

2. *Harris, et al. v. United States*, No. 20-7305 (certiorari petition filed Feb. 26, 2021)

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MISCELLANEOUS

In the

Supreme Court of the United States

_____

KEVIN REID,

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PETITION FOR CERTIORARI

KEVIN REID petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's memorandum decision summarily affirming the district court's denial of habeas relief is unpublished. It is included in the Appendix at A - 1. The district court's decision denying relief was unpublished. It is included in the Appendix at A-2 to A-3. The magistrate judge's findings and recommendations adopted by the district court were also unpublished. These are in the Appendix at A-4 to A-12.

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JURISDICTION

The Ninth Circuit's decision was filed on December 11, 2020. Appendix, A-1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition is timely filed under Supreme Court Rule 13.1 and this Court's Order of March 19 , 2020, extending the "deadline to file any petition for a writ of certiorari due on or after the date of this order . . . to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." Order of March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

Under 18 U.S.C. § 924(c) any person who uses a firearm "during and in relation to any crime of violence or drug trafficking crime" is subject to an enhanced mandatory consecutive sentence. Section 924(c)(3) defines a "crime of violence" as "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[.]"

/ / /

Hobbs Act robbery, 18 U.S.C. § 1951, states, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
> (b) As used in this section–
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

A. Introduction

Mr. Reid requests certiorari to address the Circuit split over whether attempted Hobbs Act robbery categorically constitutes a "crime of violence" for purposes of enhanced sentencing under 18 U.S.C. § 924(c). In its summary affirmance here, the Ninth Circuit followed the Seventh and Eleventh Circuits in holding that attempted Hobbs Act robbery is a "crime of violence" as defined by 18 U.S.C. § 924(c)(3)(A) simply because a completed Hobbs Act robbery is such a crime. The Fourth Circuit expressly disagreed with those circuits, correctly holding that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the

categorical approach," and observing that the Ninth, Seventh and Eleventh Circuits could only have concluded otherwise on the basis of "a rule of their own creation" that is irreconcilable with this Court's clear direction to look only at the elements the government necessarily established against a particular defendant in assessing whether an individual was convicted of a qualifying predicate under § 924(c)(3)(A). *United States v. Taylor*, 979 F.3d 203, 208 (4th Cir. 2020), *reh'g en banc denied*, No. 19-7616 (4th Cir. Dec. 11, 2020). This Court should grant review to confirm that when this Court has stated over and over again that when it comes to imposing the draconian sentencing enhancements that are governed by the categorical analysis, as this Court recently confirmed § 924(c) is, the only thing that matters is the elements that the government necessarily established beyond a reasonable doubt against the particular defendant.

B. Facts and Procedural History

1. The government indicted Mr. Reid in 1999. It alleged that he attempted to commit a Hobbs Act robbery – one which had the potential to affect interstate commerce -- in violation of 18 U.S.C. § 1951, and that during and in relation to this attempted robbery, he used and carried a firearm in violation of 18 U.S.C. § 924(c). (Appendix A-4.) Reid and another man had tried to rob a pizza parlor. (*Id.*.) After

reaching a plea agreement, Reid pleaded guilty only to the firearm count; the attempted Hobbs Act count was dismissed. (*Id*.)

On July 25, 2000, the district court sentenced Reid to a term of 44 months in prison and 36 months of supervised release. (Appendix A-5.) Reid did not appeal.

On December 3, 2003, Mr. Reid was indicted in the District of Nevada for escaping from a BOP halfway house on or about October 14, 2003. Mr. Reid was serving the sentence in this case when he escaped. The Nevada federal case ended in a guilty plea. He remains in the custody of the United States Bureau of Prisons. He currently has an expected release date of May 18, 2026. Mr. Reid remains subject to additional imprisonment and supervised release in this case. (Appendix A-5.)

2. On June 26, 2015, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that the residual clause in the Armed Career Criminal Act (ACCA) was unconstitutionally vague and so violated the Due Process protections of the Fifth Amendment. The uncertainty about how to identify the "ordinary case" of the crime, together with the uncertainty about how to determine whether a risk is sufficiently "serious,""both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id*. at 2557-58. Then, in *Welch v. United States,* 136 S. Ct. 1257 (2016), this Court held that *Johnson* applies retroactively to cases on collateral review.

3. Within a year of *Johnson*, Mr. Reid filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. section 2255 in the district court attacking his conviction and sentence. The section 2255 motion argued that *Johnson* applied to and voided the residual clause of 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague meant the robbery charged did not qualify as a "crime of violence." He further argued that under the elements clause of 18 U.S.C. § 924(c)(3)(A), attempted Hobbs Act robbery was not categorically a crime of violence. (*See* Appendix A-9.)

4. The district court, adopting the magistrate judge's findings and recommendations, rejected Mr. Reid's motion. It held that because Hobbs Act robbery itself remained a crime of violence under the residual clause, attempted Hobbs Act robbery did so as well. (Appendix A-2, A-10 to A-11.) The district court did grant a certificate of appealability. (Appendix A-3.)

5. On appeal, the Ninth Circuit granted the government's motion for summary affirmance, relying on its decision in *United States v. Dominguez*, 954 F.3d 1251, 1262 (9th Cir. 2020). (Appendix A-1.) Mr. Dominguez's petition for certiorari review is pending before this Court as case number 20-1000, with the government's responsive brief currently due by March 29, 2021.

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REASON FOR GRANTING THE WRIT

1. There is an established Circuit split regarding the question presented – whether attempted Hobbs Act robbery is categorically a crime of violence within the meaning of section 924(c)(3)(A).

The Seventh, Ninth, and Eleventh Circuits hold that Hobbs Act robbery is a crime of violence — not because any of its elements involve the use, attempted use, or threatened use of physical force, but merely because the elements of the distinct offense of completed Hobbs Act robbery do.[1/] The Fourth Circuit, by contrast, concluded that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the categorical approach" because it "does not invariably require the use, attempted use, or threatened use of physical force." *Taylor*, 979 F.3d at 208; *see also United States v. Eccleston*, 2020 U.S. Dist. LEXIS 204093 (D. NM Nov. 2, 2020) (agreeing with *Taylor* and the dissenting opinion from Circuit Judge Nguyen in *Domingquez* that attempted Hobbs Act robbery is not categorically a crime of violence under section 924(c)(3)(A)). The Fourth Circuit is correct, while the Seventh, Ninth, and Eleventh Circuits are misapplying the categorical approach and undermining the consistency that approach was designed to achieve.

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[1] *Hill* v. *United States*, 877 F.3d 717 (7th Cir. 2017); *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020); *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018).

As the Ninth Circuit recognized, attempted Hobbs Act robbery has two elements: the intent to commit Hobbs Act robbery and a substantial step toward the completion of said robbery. *Dominguez*, 954 F.3d at 1255. The Ninth Circuit also recognized that neither element necessarily involves the use of force. *Id*. The first element simply addresses intent, not conduct, while the second element can be satisfied by, among other things, walking towards a location while in possession of a weapon (*United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990)), or simply gathering weapons and waiting (*United States v. Muratovic*, 719 F.3d 809, 816 (7th Cir. 2013); *United States v. Chapdelaine*, 989 F.2d 28, 30-31, 33 (1st Cir. 1993)). In other words, neither element of attempted Hobbs Act robbery necessarily requires the use, attempted use, or threatened use of physical force. That should have been the end of the analysis under the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2258 (2016) (stressing that the categorical analysis begins and ends with the elements the government had to prove beyond a reasonable doubt to secure the conviction).

Instead, the Ninth Circuit has undermined the categorical approach. In holding that attempted Hobbs Act robbery qualified as a crime of violence, the Ninth Circuit "rest[ed] [its] conclusion on a rule of [its] own creation," and one that is irreconcilable with the clear directives repeatedly issued by the Supreme Court. *Taylor*, 979 F.3d at 208. Redefining the requisite elements analysis, the *Dominguez* court opined that all

that matters is that the defendant "specifically intended to commit a crime of violence and took a substantial step toward committing it," and that it was irrelevant whether the substantial step taken was "itself a violent act or even a crime." *Dominguez*, 954 F.3d at 1255. As Ninth Circuit Judge Nguyen explained in dissent, attempted Hobbs Act "can be committed without any actual use, attempted use, or threatened use of physical force. . . it plainly does not fit the definition of a crime of violence under the elements clause." *Id*. at 1262-63.

Likewise, in *St. Hubert* the Eleventh Circuit held that attempted Hobbs Act robbery is categorically a crime of violence even though the substantial step required for an attempted robbery conviction can fall short of "actual or threatened force." 909 F.3d at 353. As the Ninth Circuit did, the Eleventh Circuit reasoned that what matters is that the defendant intended to commit a crime of violence and took a substantial, albeit possibly non-violent, step towards its completion. *Id*. The Circuit denied rehearing en banc over a dissent by Judge Pryor, joined by two other judges, who correctly observed that the court's holding was made possible "only by converting intent. . . into attempt," recognizing that simply because someone desires to commit a crime of violence and takes a substantial step in making that desire a reality, does not require proof by the government that the individual used, attempted to use, or

threatened to use violent physical force. *St. Hubert*, 918 F.3d at 1212 (J. Pryor, J., dissenting from denial of rehr'g en banc).

The Seventh Circuit reached the same result, similarly reasoning that because a completed "Hobbs Act robbery constitutes a crime of violence" and "the attempt offense requires proof of intent to commit all elements of the completed crime," it therefore follows that attempted Hobbs Act robbery is categorically a crime of violence. *United States v. Ingram*, 947 F.3d 1021, 1025-26 (7th Cir. 2020).

As the Fourth Circuit in *Taylor* explained, the Seventh, Ninth and Eleventh Circuits' reasoning in these cases is directly at odds with the clearly established precedent of this Court: "Where a defendant takes a nonviolent substantial step toward threatening to use physical force—conduct that undoubtedly satisfies the elements of attempted Hobbs Act robbery—the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely attempted to threaten to use physical force. The plain text of § 924(c)(3)(A) does not cover such conduct." *Taylor*, 979 F.3d at 208. The Fourth Circuit observed that the other circuit courts holding to the contrary were relying on the "flawed premise" that "an attempt to commit a 'crime of violence' necessarily constitutes an attempt to use physical force." *Id*. (emphasis in original). Of course, the intent to do something is not the same thing as doing it — and the application of the draconian sentencing

enhancements under § 924(c) requires a defendant to actually use, threaten to use or attempt to use violent physical force.

Moreover, "certain crimes of violence—like Hobbs Act robbery, federal bank robbery, and carjacking—may be committed without the use or attempted use of physical force because they may be committed merely by means of threats." *Id*. (emphasis in original). Notably, "an attempt to threaten force does not constitute an attempt to use force." *Id*. at 209 (emphasis in original). For example, a defendant who attempts Hobbs Act robbery "may case the store that he intends to rob, discuss plans with a coconspirator, and buy weapons to complete the job. But none of this conduct involves an attempt to use physical force, nor does it involve the use of physical force or the threatened use of physical force. In these circumstances, the defendant has merely taken nonviolent substantial steps toward threatening to use physical force. The plain text of § 924(c)(3)(A) does not embrace such activity." *Id*.; *see also Dominguez*, 954 F.3d at 1263 (Nguyen, J., dissenting in relevant part) (observing that because the substantial step can be accomplished, by among other things, planning a robbery, buying the necessary gear, driving toward the target and then turning away after seeing police in the vicinity, "attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause" of § 924(c)).

A straightforward application of the categorical approach requires the courts to look only at the elements of the offense of conviction and thus, in the case of an attempt conviction, to look only at the elements of attempt not the completed offense. This unequivocally establishes that attempted Hobbs Act robbery is not a crime of violence. Yet three of the four circuits to have considered the issue have gotten it wrong by relying on a rule of their own creation that is irreconcilable with this Court's clearly established directive that the categorical approach must look only at the elements of the offense of conviction and nothing else. *Mathis*, 136 S. Ct. at 2248 (reiterating that when conducting the requisite categorical analysis, a court may look only to "the things the prosecution must prove to sustain a conviction"); *see, e.g., Descamps v. United States*, 570 U.S. 254, 262-63 (2013). This circuit conflict is resulting in unfair and disparate treatment of countless defendants based simply on the jurisdiction in which they are sentenced. Moreover, the disparity is currently extending beyond just the Fourth, Seventh, Ninth and Eleventh Circuits, as district courts across the country are likewise reaching inconsistent results. *Compare, e.g., Wallace v. United States*, 458 F. Supp. 3d 830, 837 (M.D. Tenn. 2020), and *Crowder v. United States*, 2019 WL 6170417, at *2 (S.D.N.Y. Nov. 20, 2019) (each holding that attempted Hobbs Act robbery is a crime of violence), *with, e.g., United States v. Culbert*, 453 F. Supp. 3d 595, 598-601 (E.D.N.Y. 2020), and *Lofton v. United States*,

2020 WL 362348, at *5-9 (W.D.N.Y. Jan. 22, 2020) (each holding the opposite). Because courts below are abandoning the categorical approach when it comes to inchoate offenses such as attempt, urgent action is needed by this Court to confirm that when it has said over and over again that the categorical approach looks only at the elements of the offense of conviction, it meant that and nothing more.

2. The Circuits Have Erred in Holding that Hobbs Act Robbery is Categorically a Crime of Violence

Because the conclusion that Hobbs Act robbery is itself a crime of violence under section 924(c)(3)(A)'s definition underpins the Circuit's ruling against Mr. Reid, whether that conclusion is correct is also at issue in this case. By discarding the problem that a defendant can be convicted of Hobbs Act robbery in violation of 18 U.S.C. § 1951 even if he was merely negligent regarding the possibility that his conduct could be perceived by another as threatening injury, the Circuits have uniformly erred. In *Leocal v. Ashcroft*, this Court held that when a defendant engaged in the intentional conduct of driving while under the influence, which resulted in serious harm to another, the offense did not qualify as a crime of violence because the conviction did not require proof that when the defendant acted, he was aware that his conduct could result in harm to another. 543 U.S. 1, 3, 9 (2004) (analyzing in an immigration context's definition of "crime of violence" 18 U.S.C. § 16(a), which is

identical to § 924(c)(3)(A)). The *Leocal* Court explained, that when the definition of a crime of violence includes the language "against the person or property of another," what matters is not the defendant's intentional use of force but rather the defendant's awareness that said intentional use of force might impact the person of another. *Id*. at 9. As straightforward as that seems, circuit courts across the country are erratically applying this Court's reasoning in *Leocal*, resulting in "a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end." *United States v. Tavares*, 843 F.3d 1, 19 (1st Cir. 2016).

Substantive Hobbs Act robbery effected by placing someone in fear of injury to their person or property does not demand any greater awareness of the harm to another caused by one's conduct than required by the statute addressed in *Leocal*.[2/] Just like in *Leocal*, a defendant can be convicted of Hobbs Act robbery so long as he engaged in intentional conduct that happened to result in harm to another (where the harm in this case is the perception of a threat of injury by another) without any proof that the

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[2] As is relevant here, Hobbs Act robbery can be committed by taking property from another through "actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1). Because the categorical approach looks at the "minimum conduct criminalized" by a statute, *Moncrieffe v. Holde*r, 133 S. Ct. 1678, 1685 (2013), the inquiry here is limited to Hobbs Act robbery in which the victim is placed in "fear of injury."

defendant was aware his conduct could be perceived as threatening or result in harm to another. Ninth Circuit Model Jury Instruction 8.143A (2010 Edition, last updated December 2020).[3/]

The reality is that when someone enters your business to steal from you, as polite as they may be, the fact that they are there to steal from you is sufficient to induce a fear of injury and be perceived by another as a threat of violence – against a person or your property – regardless of whether the defendant intended to make any such threat. The same is true of bank robbery by intimidation, and thus it is not surprising that the Ninth Circuit, as well as other circuits, have concluded that Hobbs Act robbery is a crime of violence on the basis that they have previously determined bank robbery by intimidation to be a crime of violence. Specifically, in holding that Hobbs Act robbery qualifies as a crime of violence, the Ninth Circuit relied on the fact that in *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990), it had previously held that the "analogous federal bank robbery statute, which may be violated by 'intimidation,' qualifies as crime of violence," and bolstered its decision with a citation to its unpublished decision in *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. June 24, 2016).

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[3] Available on the Circuit website: https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2020_12.pdf (last accessed March 10, 2021).

Importantly, the *Dominguez* court also attempted to bolster its holding with a citation to *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017), which analyzed the federal carjacking statute codified at 18 U.S.C. § 2119. *Dominguez* 954 F.3d at 1260. Critically, however, § 2119 only penalizes conduct that a defendant engaged in "with the intent to cause death or serious bodily injury." 18 U.S.C. § 2119. In other words, a defendant's conviction for violating § 2119 necessarily stands for the proposition that he acted with the intent to use violent physical force against the person of another. It is precisely that language – language that is missing in the Hobbs Act robbery and federal bank robbery statutes – that is dispositive under *Leocal*.

Unfortunately, the Ninth Circuit is not the only circuit truncating its analysis into whether Hobbs Act robbery qualifies as a crime of violence on the basis of a prior decision holding that bank robbery by intimidation qualifies as a crime of violence. Every circuit to have been presented with the argument has done the same. For example, in holding that Hobbs Act robbery is a crime of violence, the Fourth Circuit explained that its decision was "guided by our decision in [*United States v.] McNeal*, 818 F.3d 141 [(4th Cir. 2016)]" in which the court had held that federal bank robbery by intimidation qualified as a crime of violence on the basis that "intimidation, as proscribed by the bank robbery statute, necessarily involves the threat to use physical force." *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019) (internal

quotations and alternations omitted). The Fourth Circuit went on to opine that "[a]lthough the bank robbery statute, Section 2113, refers to use of 'intimidation,' rather than 'fear of injury,' we see no material difference between the two terms for purposes of determining whether a particular type of robbery qualifies as a crime of violence." *Id*.

Likewise, the First Circuit relied on its previous analysis of bank robbery by intimidation to conclude that Hobbs Act robbery resulting in someone experiencing a fear of injury had the same "implicit mens rea of general intent," and thus qualified as a crime of violence, ignoring the reality that neither a conviction for bank robbery by intimidation or Hobbs Act robbery by fear of injury requires proof that when the defendant acted he was aware that his conduct could place another in fear of injury. *United States v. García-Ortiz*, 904 F.3d 102, 108-09 (1st Cir. 2018). *Accord, United States v. Anglin*, 846 F.3d 954, 965 (7th Cir. 2017) (referencing its previous decision in *United States v. Armour*, 840 F.3d 904 (7th Cir. 2016) holding federal bank robbery by intimidation is a crime of violence to conclude that Hobbs Act robbery is similarly a crime of violence). Both with respect to federal bank robbery and Hobbs Act robbery the circuit courts are simply looking at the resulting harm—someone felt intimidated or feared physical harm would ensue from the defendant's conduct—and utterly failing to inquire whether the government was required to prove that the

defendant was anything but negligent regarding the possibility of harm to another when he acted, as they are required to do under *Leocal*.

Notably, when defining the contours of the element of "intimidation" in the context of federal bank robbery, which the Ninth Circuit has repeatedly opined is analogous to the element "fear of injury" in the context of Hobbs Act robbery, the Ninth Circuit has established that whether the defendant "specifically intended to intimidate [the victim] is irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). In other words, the element of "intimidation," or the equivalent "fear of injury," is established so long as the defendant willfully engaged in conduct "that would put an ordinary, reasonable person in fear of bodily harm," regardless of whether the defendant understood that his conduct would be perceived as intimidating by the ordinary person, let alone that the defendant intended to intimidate anyone. *Selfa*, 918 F.2d at 751. *Accord, Armour*, 840 F.3d at 909 (explaining that the government's burden of proof to establish bank robbery by intimidation is "low" given that all the government need establish is that 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"); *United States v. Kelley*, 412 F.3d 1240, 1245-46 (11th Cir. 2005) (explaining that "intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts," and thus "[w]hether 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") (internal quotations omitted); *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (agreeing with the Ninth Circuit that "intimidation is measured. . . 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. . . . 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.") (internal quotations omitted); *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) ("[N]either the plain meaning of the term 'intimidation' nor its derivation from a predecessor statute supports Higdon's argument that a taking 'by intimidation' requires an express verbal threat or a threatening display of a weapon").

In other words, a conviction under either § 2113 or § 1951 will be sustained so long as the defendant had the general intent to take something of value whether or not he/she had the specific intent to intimidate anyone. Where, however, the elements of "intimidation" (§ 2113) and "fear" (§ 1951) turn not on what the defendant intends,

thinks or believes, but on whether an ordinary person would have recognized that the natural and probable consequences of the defendant's conduct would probably result in a bodily injury—that is a negligence standard. *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). And negligence regarding the possibility of physical harm to another is not sufficient here—a "crime of violence" requires proof beyond a reasonable doubt that when the defendant engaged in the intentional use of force that he was more than merely negligent regarding the possibility that he would harm another (or place another in fear of injury). *Leocal*, 543 U.S. at 9.

Complex statutes, such as Hobbs Act robbery, have multiple material elements each of which may have a distinct *mens rea*. *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). The *mens rea* pertaining to the actual taking in Hobbs Act robbery is different from the *mens rea* pertaining to placing another in fear.

The Circuits are failing to reach this issue under the mistaken assumption that all that is required to qualify an offense as a crime of violence is knowing or willful conduct. *See, e.g., Dominguez*, 954 F.3d at 1261; *Mathis*, 932 F.3d at 266; *García-Ortiz*, 904 F.3d at 108-09. The fact that the taking was knowing or willful is not the issue under *Leocal*. The driving of the car that caused the serious injuries in *Leocal* was also intentional, but as this Court explained, what matters is the

defendant's awareness of whether his intentional conduct could harm another, not simply his intentional conduct that resulted in harm to another. *Leocal*, 543 U.S. at 9.

When decades of an individual's life is at stake, that distinction matters — the fact that a defendant intentionally engaged in conduct that resulted in harm to another does not stand for the proposition "that the offender is the kind of person 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*, 135 S. Ct. at 2558-59 (explaining that where the definition of a crime of violence includes the limiting language "against the person of another," Congress is targeting a narrow class of defendants who have a certain callousness towards others, those who, at the very least, perceive the risk of harm to others but act anyway).

By complying with *Leocal*, the analysis should be whether the defendant's conviction for Hobbs Act robbery necessarily establishes that he is someone who was more than negligent regarding whether his intentional conduct could harm another such that it is appropriate to strip a sentencing judge of his/her discretion under 18 U.S.C. § 3553(a) and subject the individual to severe sentencing enhancements on top of the sentence he would otherwise receive for committing the underlying offense.

Leocal dictates that it cannot be that an offense that requires intentional conduct without any proof that the defendant was aware that his conduct could result in harm

to another is a crime of violence when the requisite definition includes the limiting language "against the person of another," as § 924(c)(3)(A) does. Yet, that is what is happening across the circuits in the context of convictions under both 18 U.S.C. §§ 1951 and 2113. This case, therefore, presents a question of exceptional importance that requires this Court's guidance.[4/] Either *Leocal* does not mean what it appears to say, or else federal courts across the country are imposing extremely harsh sentencing enhancements under 18 U.S.C. §§ 924(c) and 924(e), for convictions that lack the requisite mens rea to qualify as a crime of violence. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses that do not require proof that a defendant was anything but negligent with respect to whether his use or threatened use of force could harm another.

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[4] It is possible this Court's decision in *Borden v. United States,* No. 19-5410, *cert. granted* (argued Nov. 3, 2020) will be instructive here. The question presented in *Borden* is whether the definition of a violent felony under the Armed Career Criminal Act can be satisfied by a conviction that necessarily establishes that when the defendant acted he was recklessness regarding whether his conduct could harm another. While the issue here is negligence, not recklessness, in reaching the holding, *Borden* almost certainly will require this Court to clarify whether the relevant *mens rea* is the one that modifies simply the use of force, as the Ninth Circuit contends, or whether a prior conviction must categorically establish that when the defendant intentionally used force he had some awareness that his conduct could result in harm to another.

3. This Case Presents a Good Vehicle to Address these Questions

This case is straightforward and provides a good vehicle for the Court to address not only the conflict regarding the treatment of attempted Hobbs Act robbery, but also the implications of the question presented for other attempt and conspiracy crimes. As detailed above, courts have applied the same reasoning that the Ninth Circuit employed here to hold that attempted carjacking and attempted bank robbery are crimes of violence. Other criminal statutes, as well as some immigration laws such as 16(a), similarly rely on the categorical approach to define whether an offense qualifies as a "crime of violence." It is vitally important that this Court grant review and correct the Circuits' errors. This case provides the means to correct the inconsistent treatment of attempted Hobbs Act robbery under § 924(c)(3)(A) and to instruct the federal courts in how to correctly apply the categorical approach to attempt offenses.

CONCLUSION

For all the above reasons, Mr. Reid asks this Court to grant his writ.

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Respectfully submitted,

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