NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JASON STALLCUP,
Petitioner,
v.
UNITED STATES OF AMERICA,
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

Respectfully submitted,

BRUCE D. EDDY
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF ARKANSAS

C. Aaron Holt
Research and Writing Specialist
Counsel of Record
112 W. Center Street, Ste. 300
Fayetteville, Arkansas 72701
(479) 442-2306
aaron_holt@fd.org

QUESTION PRESENTED FOR REVIEW

Does completed Hobbs Act robbery qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Jason Stallcup, No. 5:13-cr-50042, U.S. District Court for the Western District of Arkansas. Judgment entered March 20, 2014.

United States v. Jason Stallcup, No. 14-1810, U.S. Court of Appeals for the Eighth Circuit. Judgment entered October 24, 2014.

Jason Stallcup v. United States, No. 5:20-cv-05214, U.S. District Court for the Western District of Arkansas. Order denying Motion to Vacate entered April 12, 2021.

Jason Stallcup v. United States, No. 21-2322, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 6, 2021.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

JUDGMENT BELOW

On August 6, 2021, the court of appeals entered its judgment in Eighth Circuit Case No. 21-2322 denying Jason Stallcup's application for a certificate of appealability after the district court denied his motion to vacate under 28 U.S.C. § 2255. This judgment is unpublished. A copy of the judgment is attached in the Appendix to this petition at p. 1a.

A slip copy of the magistrate's report & recommendation on Mr. Stallcup's motion to vacate may be found at *United States v. Stallcup*, No. 5:13-cr-50042, 2021 WL 1392871 (W.D. Ark. Mar. 26, 2021); a copy is attached in the Appendix to this petition at p. 4a. A slip copy of the district court's order denying and dismissing Mr. Stallcup's motion to vacate may be found at *United States v. Stallcup*, No. 5:13-cr-50042, 2021 WL 1392859 (W.D. Ark. Apr. 12, 2021); a copy is attached in the Appendix to this petition at p. 2a.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2021. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

18 U.S.C. § 924(c)(3) provides, in relevant part:

> For purposes of this subsection the 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 . . . .

18 U.S.C. § 1951 provides, 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.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right

STATEMENT OF THE CASE

1. Jason Stallcup admitted to robbing the Romance Diamond Jewelry Store in Fayetteville, Arkansas, on December 15, 2008, and to brandishing a .22-caliber firearm while doing so. Mr. Stallcup was convicted of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). On March 20, 2014, he was

sentenced to 240 months imprisonment on the Hobbs Act robbery count and 87 months on the § 924(c) count, to run consecutively. Mr. Stallcup is currently serving his sentence at USP Coleman II in Sumterville, Florida.

2. On June 22, 2020, Mr. Stallcup filed a pro se Motion to Equitably Toll the Statute of Limitations indicating his desire to file a motion to correct his sentence under 28 U.S.C. § 2255 based on this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). Mr. Stallcup had not previously filed a § 2255 motion in connection with his convictions. The district court appointed the Federal Public Defender "to review Defendant's Motion and file a status report with the Court addressing whether the Defendant has asserted viable grounds for filing a 28 U.S.C. § 2255 motion and whether such a motion would be considered timely filed." Counsel filed the status report as directed; counsel explained in this report that Mr. Stallcup wished to advance the argument that the crime of Hobbs Act robbery only qualifies as a "crime of violence" under the residual clause of § 924(c)(3)(B), that this Court had held that residual clause to be unconstitutionally vague in *Davis*, and that Stallcup's § 924(c) conviction for brandishing a firearm should be vacated, predicated as it was upon an offense that could no longer be considered a crime of violence. Counsel expressed the opinion that the district court should consider and rule upon this claim even though it appeared that current Eighth Circuit precedent would likely prevent it from being able to grant relief. Counsel also explained that the motion should be considered timely filed, as Mr. Stallcup had sought to assert the right newly recognized in *Davis* within one year of the filing of that decision.

3. On October 29, 2020, the district court entered an order directing counsel to file a § 2255 motion to vacate addressing the issues raised in the status report. On December 14, 2020, counsel filed a § 2255 motion to vacate as directed and raised the claim discussed in the status report. The district court, as the sentencing court, had jurisdiction over this motion pursuant to § 2255. The claim was asserted in the § 2255 motion that Mr. Stallcup's § 924(c) conviction should be vacated as Hobbs Act robbery could no longer be considered a crime of violence in light of *Davis*. It was acknowledged in the motion that the Eighth Circuit had previously held that Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). *See Diaz v. United States*, 863 F.3d 781, 783-84 (8th Cir. 2017). However, a California district court decision was identified in which the court found that Hobbs Act robbery does not categorically qualify as a crime of violence under the elements clause of § 924(c)(3)(A) because it can be committed by causing fear of future injury to property, which does not require violent physical force. *See United States v. Chea*, No. 98-CR-20004-1, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019).

4. On April 12, 2021, the district court entered its order adopting the magistrate's report and recommendation in its entirety and denying and dismissing with prejudice Mr. Stallcup's § 2255 motion. The court agreed with the magistrate judge that there was no reasonable basis to support a certificate of appealability and accordingly declined to issue one.

5. On June 11, 2021, Mr. Stallcup filed a timely notice of appeal that, pursuant to Federal Rule of Appellate Procedure 22(b)(2), constituted a request for a certificate of appealability to the judges of the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction to consider this request pursuant to 28 U.S.C. §§ 1291, 2253, and 2255(d). On August 6, 2021, without issuing an opinion, the court of appeals entered its judgment denying Mr. Stallcup's application for a certificate of appealability and dismissing his appeal.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should resolve the important question of whether completed Hobbs Act robbery—an offense that can be committed by causing fear of future injury to property, or via negligent or reckless conduct that is perceived as a threat of bodily harm —qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

This Court has granted certiorari on the question of whether *attempted* Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c). *See United States v. Taylor*, No. 20-1459 (set for argument Dec. 7, 2021). It has yet to address the related question of whether completed Hobbs Act robbery is a crime of violence under § 924(c). From a review of the arguments advanced by the parties in *Taylor*, it is not clear that the Court will necessarily have to decide in that case whether completed Hobbs Act robbery is a § 924(c) crime of violence. In the event that the question will (or may) be decided in *Taylor*, it may serve the interest of judicial efficiency to hold Mr. Stallcup's petition in abeyance pending the disposition of that case.

However, if the matter is not decided in *Taylor*, Mr. Stallcup's petition should be granted so that this Court can answer this important question. In *United States*

v. Davis, 139 S. Ct. 2319 (2019), this Court held the residual clause at § 924(c)(3)(B) to be unconstitutionally vague. Now, an offense will qualify as a crime of violence under § 924(c) only if it meets the criteria set forth in the elements clause of § 924(c)(3)(A)—i.e., only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

While it appears that every court of appeals to have considered this issue has concluded that Hobbs Act robbery in violation of 18 U.S.C. § 1951 qualifies as a crime of violence under the elements clause of § 924(c)(3)(A), these courts are wrong. The courts of appeals have ignored the text of the statute and their own prior decisions that indicate that Hobbs Act robbery can be committed without the volitional use or threat of violent physical force.

In determining whether an offense qualifies as a crime of violence under § 924(c)'s elements clause, courts are required to use a categorical approach. *See McCoy v. United States*, 960 F.3d 487, 489 (8th Cir. 2020). Under such an approach, a court examines the statutory elements of the offense of conviction and determines if any of them necessarily involves the use, attempted use, or threatened use of physical force against the person or property of another. *United States v. Ross*, 969 F.3d 829, 837 (8th Cir. 2020). An offense qualifies as a crime of violence only if all of the criminal conduct covered by a statute, "including the most innocent conduct," necessarily involves the use, attempted use, or threatened use of physical force. *See United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008). "When a statute defines an offense in a way that allows for both violent and nonviolent means of

commission, that offense is not 'categorically' a crime of violence under the force clause." *United States v. Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc). In order for Hobbs Act robbery to qualify as a crime of violence, the most innocent conduct it punishes must categorically involve as an element the use, attempted use, or threatened use of "*violent* force"—that is, "strong physical force" that is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original).

Hobbs Act robbery may be committed by:

> 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.

18 U.S.C. § 1951(b)(1). While this offense may be committed in a manner involving violence, it can also be committed by placing another in fear of future injury to property, which does not necessarily involve the use, attempted use, or threatened use of violent physical force. As noted by the district court in *United States v. Chea*, No. 98-CR-20004-1, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019), the phrases "fear of injury," "future," and "property" are not defined in § 1951(b)(1); therefore, they must be given their ordinary meaning. *Id.* at *8. "Nothing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of any physical force, much less violent physical force." *Id.* In a situation in which the property threatened is intangible, "the use of violent physical force would be an impossibility" because such

property "can be injured without the use of any physical contact at all . . . ."[1] *Id.* "Even tangible property can be injured without using violent force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently."[2] *Id.* Because there is no indication in the statute that the property has to be in proximity to the victim at the time of the robbery, there is also

---

[1] "The concept of 'property' under the Hobbs Act is an expansive one" that "includes *intangible assets* such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining conviction under the Hobbs Act when the president of a trade council threatened "to slow down or stop construction projects unless his demands were met"); *United States v. Local 560 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the circuits to have considered the question "are unanimous in extending the Hobbs Act to protect intangible, as well as tangible, property").

[2] As another district court has noted, "[t]here are items in this world that possess some value simply because no one else has touched them; rare baseball cards devoid of fingerprints, rare comic books wrapped in thick plastic that have never been opened, for example. These items would lose value if slightly handled directly in a loving fashion, let alone in a haphazard or forceful manner calculated to physically harm the item, and the owners fear the resulting injury—the loss of pecuniary value—so they take great measures to protect those items from normal wear and tear of handling. Given that recognition—that the statute punishes conduct that does not merely result in physical injury—it is difficult for this Court to understand how it can conclude robbery by fear of injury . . . necessarily involves a threat to use physical force if the robber's demands are not met as the Government argues." *Haynes v. United States*, 237 F. Supp. 3d 816, 826 (C.D. Ill. 2017) (internal quotations and emphasis omitted). Although the court in *Haynes* found that the petitioner's argument was "not without merit," it also found that it was bound by recent Seventh Circuit precedent to conclude that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A). *Id.* at 826-27 (citing *United States v. Anglin*, 846 F.3d 954 (7th Cir. 2017), *vacated on other grounds by Anglin v. United States*, 138 S. Ct. 126 (2017)). In part because it had "expressed skepticism with the Government's argument that 'fear of injury' is equivalent to the 'threatened use of physical force' in the statutory definition of robbery in 18 U.S.C. § 1951," the district court issued a certificate of appealability. *Id.* at 830-31.

no basis on which to argue that the fear of injury to the property necessarily involves a fear of injury to the victim or another person when the threat to the property is made. *Id.* at *9.

Furthermore, in order to qualify as a crime of violence under § 924(c)(3)(A), an offense must also involve a certain level of intent. In *United States v. Torres-Villalobos*, 487 F.3d 607, 614-17 (8th Cir. 2007), the Eighth Circuit discussed this Court's interpretation of 18 U.S.C. § 16(a) (which is essentially identical to the force clause of § 924(c)(3)(A)), noting specifically the Court's conclusion that for an offense to qualify as a crime of violence under the force clause, "the 'active employment' of physical force must be an element of the offense." *Torres-Villalobos*, 487 F.3d at 615 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). "Because § 16(a) requires the 'use' of force, it 'most naturally suggests a higher degree of intent than negligent or merely accidental conduct,' and it is 'much less natural to say that a person actively employs physical force against another by accident.'" *Id.* (quoting *Leocal*, 543 U.S. at 9). Not long after the district court denied Mr. Stallcup's motion to vacate in the instant matter, this Court expressly held that a criminal offense with a *mens rea* of recklessness cannot qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i). *See Borden v. United States*, 141 S. Ct. 1817, 1821-22 (2021). The Court in *Borden* also cited to *Leocal*, noting that the elements clause of the ACCA is "relevantly identical" to the statutory definition of a "crime of violence" found at § 16(a). *Id.* at 1824. The elements clause of § 924(c)(3)(A) and the ACCA's elements clause are also "relevantly

identical," and an offense involving a *mens rea* of recklessness or negligence likewise cannot qualify as a crime of violence under § 924(c)(3)(A). If a defendant's reckless or negligent actions cannot qualify as the "use" of physical force, his reckless or negligent actions likewise cannot qualify as the communication of a threat of physical force sufficient to satisfy the elements clause.

The "fear of injury" element of Hobbs Act robbery has often been equated with the "intimidation" element of federal bank robbery. *See, e.g.*, *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019) ("Although the bank robbery statute, [18 U.S.C. §] 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."). Under the federal bank robbery statute, "intimidation" occurs when "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Woodrup*, 86 F.3d 359, 363 (4th Cir. 1996); *see also United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (adopting the same definition and quoting *Woodrup*); *United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010) (same, but citing *Yockel*).

In *Yockel*, the Eighth Circuit cited cases from the Fourth and Ninth Circuits holding that "intimidation" is measured by an objective standard and is not dependent upon whether the defendant possessed the intent to intimidate. 320 F.3d at 823-24 (citing *Woodrup*, 86 F.3d 359; *United States v. Foppe*, 993 F.2d 1444 (9th Cir. 1993)). The court of appeals recognized that, "[i]n this circuit, 'intimidation', as

it is used in § 2113(a), is also determined by an objective standard." *Yockel*, 320 F.3d at 824. Because of the applicability of this objective standard, "whether or not Yockel intended to intimidate the teller is irrelevant in determining his guilt." *Id.* Although this Court has held that a general intent *mens rea* must be read into the bank robbery statute, *see Carter v. United States*, 530 U.S. 255, 268-69 (2000), the court of appeals in *Yockel* concluded that "the *mens rea* element of bank robbery d[oes] not apply to the element of intimidation . . . ." *Yockel*, 320 F.3d at 824.[3] Accordingly, a defendant in a jurisdiction applying an objective standard to the element of intimidation[4] may be convicted of bank robbery without any showing of intent to intimidate.

This Court has clearly held that a standard based upon the objective perspective of an ordinary, reasonable person is a negligence standard. *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). In *Elonis*, the defendant was convicted under 18 U.S.C. § 875(c), the federal statute prohibiting interstate threats to injure the person of another, based on certain posts he made to the social media site Facebook. He was convicted "under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat." *Id.* at 2004. This Court noted that "[h]aving liability turn on whether a 'reasonable person'

---

[3] Some other circuits have interpreted *Carter* to require proof that a bank robbery defendant "knew that his actions were objectively intimidating." *See United States v. Wilson*, 880 F.3d 80, 87 (3d Cir. 2018) (quoting *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir. 2016)). The Eighth Circuit has not followed this approach.

[4] The Eleventh Circuit has also applied an objective standard to a determination of whether the element of intimidation has been met. *See United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) ("Whether a particular act constitutes intimidation is viewed objectively . . . and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating.").

regards the communication as a threat—regardless of what the defendant thinks—reduces culpability . . . to negligence . . . ." *Id.* at 2011 (internal quotations and citation omitted). Even if it must be shown that the defendant knew the "contents and context of his posts" in order to convict, the Court concluded, such a test would still be only "a negligence standard." *Id.*

Because the test for whether the intimidation element is met under the federal bank robbery statute is based upon whether a "reasonable person" would infer a threat from the defendant's actions, it likewise must be considered a negligence standard.[5] It follows, then, that a negligence standard is also applied to determine whether whether the "fear of injury" element has been met under the Hobbs Act. In other words, a defendant may be convicted of Hobbs Act robbery if an ordinary person in the victim's position could reasonably infer a threat of bodily harm from the defendant's actions, *whether or not the defendant actually intended to put the person in fear of injury*. Hobbs Act robbery accordingly fails to qualify as a crime of violence under the elements clause of § 924(c)(3)(A) because it lacks the specific, active intent required to qualify as a crime of violence. As Mr. Stallcup has argued, if a defendant's negligent (or reckless) actions cannot qualify as the "use" of physical force against the person or property of another, his negligent (or reckless) actions likewise cannot

[5] This is not to say that the overall offense of bank robbery is subject to proof by only a negligence standard, which would be in contravention of *Carter*. However, under the approach taken by the Eighth Circuit, "the *mens rea* for the *actus reus* of bank robbery is satisfied by proof that [the defendant] knew he was physically taking money." *Yockel*, 320 F.3d at 823. It is only the element of intimidation that is subject to a negligence standard; the overall offense requires proof of general intent as to the taking of property.

qualify as the communication of a threat of physical force against the person or property of another under § 924(c)(3)(A). As this Court remarked in *Leocal* when construing § 16, "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" 543 U.S. at 11. Interpreting such a term "to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.*

There is plentiful case law indicating that defendants may be convicted of robbery offenses based on negligent actions that are found to be objectively intimidating. In *United States v. Smith*, 973 F.2d 603 (8th Cir. 1992), the defendant argued that his actions "were neither forceful, purposeful, nor aggressive." *Id.* at 604. He asserted that he "simply asked the tellers for money, and because of bank policy that tellers comply with all demands for money, the Norwest tellers simply gave [him] the money." *Id.* In finding that the evidence was sufficient to support the intimidation element, the court focused on testimony from the bank teller that the defendant was acting "very edgy and nervous," and that he was wearing a fanny pack that the teller feared might contain a weapon. *Id.* at 604-05. Other aspects of the defendant's conduct that were found to qualify as "intimidation" were that he stated he wanted to make a "withdrawal" and that he put his elbows up on either side of the window and leaned close to the teller. *Id.* at 603-04. A defendant with a sincere belief that bank policy will be sufficient to overcome a teller's reluctance to hand over money, and who therefore sees no need to actively employ any intimidating measures,

may nevertheless be found to have acted in an objectively intimidating manner based only upon his demeanor and his choice of accessories.

In *Woodrup*, the court concluded that, although the defendant "did not present a note, show a weapon, or make an oral demand for money," the evidence was sufficient to support a finding by the jury that "the teller was intimidated because she reasonably could infer a threat of bodily harm from the fact the Woodrup reached toward her and then vaulted over the counter at her . . . ." 86 F.3d at 363-64. One of the factors relied upon by the court in *Yockel* to support the intimidation element was the defendant's appearance—"Yockel appeared dirty and had unkempt hair, and eyes that were blackened, as if he had been beaten." 320 F.3d at 824. A court would certainly take other similar aspects of a defendant's appearance into account in making an objective determination as to whether a reasonable teller might have been intimidated—a teller might testify, for example, that the robber was physically large and imposing, or had visible tattoos, or dressed in a certain way, or had a bushy beard, or wore an unpleasant expression on his face.

In *United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (unpublished table opinion), the court affirmed a finding of intimidation when the defendant reached over the counter and took money from the teller's open drawer after asking for change for a dollar, and then pulled away when the teller grabbed his arm and tried to close her drawer, accidentally hitting her in the mouth while doing so. *Id.* at *1. In yet other cases, intimidation was found based in part on the defendant's proximity to the bank teller. *See Kelley*, 412 F.3d at 1245 (defendant jumped onto the counter at a

vacant teller station and grabbed handfuls of cash while "within arm's length" of another teller); *United States v. Caldwell*, 292 F.3d 595, 596 (8th Cir. 2002) (defendant jumped over the counter, made eye contact with a teller, and "approached to within one to two feet of her" before turning and going around a counter to an adjacent teller station; the defendant said nothing to the teller, did not gesture at her in any way, and made no indication that he had a weapon). Accordingly, simply getting too close to a teller can support an objective finding of intimidation. To use an example noted by the Court in *Leocal*, "stumbling and falling into" someone would not be considered a used of physical force against the person of another (*see* 543 U.S. at 9); however, a robber stumbling and falling into a cashier—or even just near one—could surely be viewed as objectively intimidating from the cashier's vantage point.

These cases are instructive as to how "intimidation" is treated by the courts—and, consequently, how "fear of injury" is treated. Because of the objective standard applied to the intimidation/fear-of-injury element, and the complete lack of any *mens rea* associated with that element, it is readily apparent that a defendant may be convicted of an offense such as bank robbery or Hobbs Act robbery despite only negligently or recklessly engaging in conduct that would put a reasonable, ordinary person in fear. Even if a *mens rea* requirement is read into the Hobbs Act robbery statute, and a showing that a defendant acted with purpose or knowledge is required for conviction, it is clear that such a mental state does not have to be shown as to the conduct that places another in fear of injury; instead, the heightened mental state only applies to the element concerning the taking of money or property in a manner

that obstructed, delayed, or affected commerce. *Borden* makes clear that a *mens rea* more culpable than recklessness is required as to the particular element of the offense relating to the defendant's threatening or violent conduct in order for the offense to be found to involve the use or threatened use of physical force against the person or property of another. Because one can commit Hobbs Act robbery by means of negligent actions that cause fear in a victim, it categorically fails to qualify as a crime of violence under § 924(c)(3)(A).

The question presented here is an important and recurring one, and the Court should definitively answer it.

CONCLUSION

For all of the foregoing reasons, Petitioner Jason Stallcup respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 4th day of November, 2021.

Respectfully submitted,

BRUCE D. EDDY
Federal Public Defender
Western District of Arkansas

/s/ *C. Aaron Holt*

C. Aaron Holt
Research and Writing Specialist
Office of the Federal Public Defender
112 W. Center Street, Ste. 300
Fayetteville, Arkansas 72701
(479) 442-2306
aaron_holt@fd.org

Counsel for Petitioner