NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CEPHUS HOLLIS

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

Whether the DC Court of Appeals' erroneous statutory interpretation of the DC statute criminalizing unauthorized taking, use or operating a vehicle "to facilitate a crime of violence" as not requiring an intent to commit a crime of violence at the time the vehicle is taken, used or operated, thereby violated Petitioner's constitutional right to due process where the erroneous statutory interpretation permitted jurors to convict him without finding a critical element of the offense and it resulted in an enhanced sentence where there was insufficient evidence to support the convictions under the correct interpretation of the law.

Whether the DC Court of Appeals' erroneous statutory interpretation of the DC statute criminalizing unauthorized taking, use or operating a vehicle "during a crime of violence" violated Petitioner's constitutional right to due process by enhancing his sentence where the court interpreted the statute as including the following conduct: (1) after exiting a vehicle that the defendant took without authorization, he subsequently spontaneously assaulted someone; (2) the defendant took a vehicle without authorization *after* assaulting the driver of that vehicle outside the vehicle, and (3) the defendant took a vehicle without authorization, simultaneously taking the contents of the same vehicle.

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PETITION FOR WRIT OF CERTIORARI

Cephus Hollis respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals ("DCCA") in this case.

CITATION TO OPINIONS BELOW

The DCCA issued a published decision in *Cephus Hollis v. United States*, 183 A.3d 737 (D.C. 2018). *See,* Appendix A. Petitioner filed a petition for rehearing, which was denied on August 24, 2018. *See*, Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254. The DCCA issued its final decision in this matter on August 24, 2018. Pursuant to Supreme Court Rule 13.3, this petition has been timely filed within 90 days of August 24, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was charged with numerous felonies, including two counts of Unauthorized Use of a Vehicle During a Crime of Violence ("UUV/COV"), stemming from two separate incidents— the first occurring on September 8, 2014, involving complainant Hampton Gathers, and the second occurring on September 12, 2014, involving complainant Zhong Zu. According to the government, Petitioner and his cousin, Khyree Waters, stole or attempted to steal several cars and assaulted both Gathers and Zu, causing each man serious bodily injury. Neither complainant could identify the perpetrators, but Waters was permitted to enter a guilty plea to far fewer crimes in exchange for his testimony against Petitioner. Petitioner denied that he was involved.

Petitioner and Khyree Waters, who testified for the government, set out one night with the sole intent being to steal cars. They took an unoccupied Dodge Stratus owned by Christine Robinzine without incident and drove around looking for another car. According to Waters, they purposely backed away when they saw that a car was occupied. For example, when they came upon a woman delivering newspapers and noticed that the woman would get out of her car to drop off the newspapers, Petitioner said the car would be easier to steal because delivery persons would leave their keys in the car when they got out to drop off the newspapers. Petitioner suggested that they wait until the woman got out of her car, then

Waters should "hop out and get in the car." When they approached the woman's car, however, Waters saw someone else sitting in the car, so they decided not to steal that car and instead, drove away.

Similarly, Waters testified that when they approached a Dodge Avenger owned by Hampton Gathers, who was also delivering newspapers, "he was getting out of the car." Petitioner told Waters to "wait and just watch what he does." According to Waters, "We just sat there and just followed behind him, watched his every move." At the time Waters drove up next to Gathers' car, Gathers had gotten out of his car and was "[a]bout to throw the paper to the yard." It was *then* that Petitioner got out of the Stratus and got into Gathers' vehicle, mistakenly believing the keys would be inside. Waters' testimony shows that there was no intent to assault, carjack (which requires force or violence)[1] or rob[2] (which also requires force or violence) Gathers. The sole intent was to steal another unoccupied car.

Unfortunately, things went horribly awry when Mr. Gathers reappeared at his car while Petitioner was still inside. Petitioner got out of the car, demanded Mr. Gathers' keys and, when Gathers resisted, Petitioner began beating and punching him until he fell to the

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[1]The carjacking statute, D.C. Code § 22-2803(a)(1), provides that "[a] person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle."

[2]The robbery statute, D.C. Code § 22-2801 provides that "[w]hoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery. . ."

ground. Waters joined Petitioner and both men kicked Mr. Gathers until he let go of the keys. They left him on the ground and Petitioner drove off in Gathers' vehicle, which contained newspapers, a cell phone and other items. Waters drove off in the Dodge Stratus they had previously taken. Mr. Gathers suffered injuries for which Petitioner was convicted of aggravated assault.

The government's theory of its case coincided with Waters' testimony that the men's only intention was to steal unoccupied cars that night. In opening statement, the prosecutor told jurors that Petitioner and Waters were out "stealing joy rides," "searching for other cars to steal," and "*conspiring to steal cars*."(emphasis added). In closing arguments, again the prosecutor followed the same theory that Petitioner was out there that night "driving around looking for other cars to steal." The prosecutor also made clear the government's theory that the charged crime of aggravated assault of Mr. Gathers was the "crime of violence" referred to in the UUV/COV charge. After first telling jurors that Petitioner took the cars with the intent to steal other cars, he then stated,

> And the crime of violence that [UUV/COV is] referring to, and we're talking about [the Dodge Stratus], is *what happened later to Hampton Gathers*." Because the theft of [the Dodge Stratus] itself is not a crime of violence. But *what happened to Hampton Gathers* hours later was.

(emphasis added). Then, after the prosecutor described the assault of Gathers and the injuries Gathers sustained, he again tied the assault to the UUV/COV: "So for *what the Defendant did to Hampton Gathers*, there are going to be a number of charges again for you to

consider:. . . and *again, unauthorized use of a vehicle*." (emphasis added).

REASONS FOR GRANTING THIS WRIT

I. The DC Court of Appeals' Erroneous Interpretation of The Statute Governing Unauthorized Use of a Motor Vehicle During The Course Of Or To Facilitate a Crime of Violence ("UUV/COV") So As Not To Require Intent Violated Petitioner's Right to Due Process Because There Was Insufficient Evidence to Support Petitioner's Convictions and The Erroneous Interpretation Resulted in Enhancing Petitioner's Sentence Substantially.

A. Erroneous Interpretation of the Statute.

D.C. Code § 22-3215(d)(2)(A) provides in pertinent part:

> A person convicted of unauthorized use of a motor vehicle. . . under who *took, used, or operated* the motor vehicle, or caused the motor vehicle to be taken, used, or operated, *during the course of or to facilitate a crime of violence*, shall be:
> . . . .
> (ii) If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.

Id. (emphasis added). Section 22-3215(2)(B) states that "[f]or the purposes of this paragraph, the term "crime of violence" shall have the same meaning as provided in § 23-1331(4)." Section 23-1331(4) defines "crime of violence" to include aggravated assault, assault with intent to kill, assault with significant bodily injury, carjacking, armed carjacking, and robbery. The penalty for UUV without the added COV language is "not more than 5 years." D.C. Code § 22-3215(d)(1). As shown above, the penalty if convicted of UUV/COV is "not less than 5 years." D.C. Code § 22-3215(d)(2)(A)(ii). The trial court sentenced Petitioner to 60 months, all but 24 suspended.

In *Cephus Hollis v. United States*, 183 A.3d 737 (D.C. 2018), the D.C. Court of Appeals held that the phrase "to facilitate" does not require that a defendant take, use or operate a vehicle with the intent to facilitate a crime of violence. Rather, it held, the enhancements apply where taking, using or operating a vehicle provides the means of transportation to a location where an unplanned, spontaneous crime of violence occurs, and/or where taking, using or operating a vehicle results in providing the means of transportation to flee from the scene of a crime of violence.

In the present case the appellate court's decision meant that because the Stratus "provided the means by which Petitioner could scour the neighborhood and brought him to the location where the assault on Mr. Gathers and the robbery of his car could occur," the use of the Dodge Stratus "could be seen to have facilitated [Petitioner's] commission of the eventual offense." *Hollis* at 745. It similarly concluded that "use of [Gathers' vehicle] made possible [Petitioner's] fleeing the scene of the crime to avoid detection, and the actual robbery of at least the contents of the car." *Hollis* at 745-746.

But "in examining the statutory language, it is axiomatic that the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983). Here, the appellate court construed *only* the word "*facilitate*," which, Petitioner agrees, *on its own* means "make easier or less difficult." *Hollis* at 745 (citing Webster's Third New International Dictionary 812 (2002). The statute, however, requires that a

defendant took, used or operated a vehicle ***to*** *facilitate* a crime of violence.

"***To***" plus an infinitive means "to express purpose (to answer "Why...?")," such as "He bought some flowers *to give* to his wife," or "He locked the door *to keep* everyone out." https://learnenglish.britishcouncil.org/en/english-grammar/infinitive. The same publication explains that "We sometimes say in order to," as in "We set off early in order to avoid the traffic" or "They spoke quietly in order not to wake the children." *Id*; https://www.ef.edu/english-resources/english-grammar/infinitive ("To" plus the infinitive"expresses the purpose of something" and "to indicate the purpose or intention of an action." In that context, "to has the same meaning as in order to or so as to"); https://grammar.collinsdictionary.com/us/easy-learning/the-to-infinitive ("The to infinitive can be used to express purpose or necessity after a verb followed by a pronoun or a noun," such as "I brought it to read on the train = so that I could read it").[3] Therefore, construed with "ordinary sense and with the meaning commonly attributed" to it, "***to*** *facilitate*" means "for the purpose of," "in order to," "with the intent to" facilitate.

Moreover, the UUV statute lends support for Petitioner's interpretation of "to facilitate." UUV requires jurors to find that a defendant took, used or operated the vehicle "for his/her own profit, use or purpose." *D.C. Criminal Jury Instructions,* No. 5-302(B).

[3]The dictionary defines "in order to" as "for the purpose of." http://www.thefreedictionary.com/in+order+to. "Purpose"commonly means "the act or fact of intending. . .; the design or purpose to commit a wrongful or criminal act; the state of mind with which an act is done. . ." https://www.merriam-webster.com/dictionary/intent.

Therefore, in order for the enhancements to apply, a defendant's taking, using or operating the vehicle must have been *for the purpose* of facilitating a crime of violence. The "purpose," *i.e.,* "intent," must be formed at the time the vehicle is taken, used or operated, not subsequently in a spontaneous incident.

The appellate court's omission of the word "to" from its interpretation creates an entirely different crime than the one reflected in the statute. Instead of enhancements applying when a defendant took, used or operated a vehicle *in order to*, *with the purpose of*, *with intent to* make it easier to commit a crime of violence, enhancements would apply merely if the taking, using or operating a vehicle *resulted* in making it easier to commit a crime of violence, even if the crime of violence was an unplanned, spontaneous act. The court's interpretation does not coincide with the ordinary meaning of the statutory language.

B. There Was Insufficient Evidence That Petitioner Took, Used or Operated The Stratus and/or Gathers' Vehicle "To Facilitate" The Assault on Gathers.

The appellate court states that Petitioner's use of the Stratus provided him transportation to the location of the Gathers' assault and, therefore, he is guilty of UUV/COV. However, to say that use of a vehicle "facilitated" the assault (the appellate court's interpretation) "disregards the ordinary and accepted meaning of the word. . ." *Platt v. United States*, 163 F.2d 165, 167 (10th Cir. 1947). In *Platt* the court flatly rejected a similar interpretation to support forfeiture of a vehicle based on the purchase of narcotics:

> The use of an automobile did not make the accomplishment of the purchase more easy or free it from obstructions or hindrance, or make the sale any less difficult. It was merely the means of locomotion by which Blanche Cooper went to the store to make the purchase. Its use enabled her to get to the store more quickly than if she had walked or had used a slower means of transportation. But the argument that this facilitated the purchase disregards the ordinary and accepted meaning of the word when applied to the sale. Ascribing such a meaning to the use of the word "facilitate" would raise grave doubts as to the constitutionality of the statute on the ground of vagueness and indefiniteness. The means employed by Blanche Cooper in going to the store had nothing to do with the purchase. The ease or difficulty of the purchase would have been the same no matter how she got there.

Id. *Also see, Howard v. United States*, 423 F.2d 1102, 1104 (9th Cir. 1970)("The use of an automobile to commute to the scene of a crime does not justify the seizure of that automobile. . ."). Here, the "ease or difficulty" of the assault on Mr. Gathers would have been the same no matter how Petitioner got to the location. The Stratus was "merely the means of locomotion." *Platt*, 163 F.2d at 167.

Second, that the Stratus and/or Gathers' vehicles made it easier to flee the scene of the assault does not equate to taking, using or operating a vehicle to facilitate a crime of violence. "Flight" is neither a crime of violence nor an element of aggravated assault. At best, flight proves consciousness of guilt.[4] And again, even under the appellate court's

[4]In the District of Columbia, a defendant's flight or concealment is considered an "'admission[ ] by conduct.'" *Burgess v. United States*, 786 A.2d 561, 569 (D.C.2001) (quoting *Proctor v. United States*, 381 A.2d 249, 251 (D.C.1977)). Where there is evidence of "flight," juries are instructed as follows:

> You have heard evidence that [defendant] fled or hid [after the

interpretation of the statute, use of either the Stratus or Mr. Gathers' vehicle to flee the scene did not make the assault any easier.

Third, by including robbery and carjacking as the crimes of violence, the appellate court ignored that the government never relied on those crimes at trial as the crimes of violence. The government only belatedly, on appeal, suggested them. Even so, with respect to the Stratus, to use, take or operate a vehicle that "could have facilitated" (the appellate court's interpretation) a carjacking and/or robbery would require jurors to find that Petitioner's taking of the Stratus "provided the means of transportation to a location" where he carjacked and robbed Gathers' vehicle. As shown above, however, the "locomotion" theory fails because it did not make the actual carjacking or robbery any easier or less difficult. *See, Platt, supra*. Also, with respect to Gathers' vehicle, the appellate court's analysis (again employing an incorrect interpretation of the statute) leads to an absurd result, *i.e.,* that *Petitioner's taking of Gathers' car made it easier to take Gather's car*.

Also misguided is reliance on the asportation element of robbery to support a UUV/COV charge.[5] Again, the "locomotion" theory fails because taking the Stratus did not

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> event]. It is up to you to decide whether s/he fled or hid. If you find s/he did so, you may consider his/her fleeing or hiding as tending to show feelings of guilt, which you may, in turn, consider as tending to show actual guilt. . .

D.C. Criminal Jury Instructions, Instruction No. 2.301. The jury in the present case was not so instructed.

[5]Any finding that "asportation" is required for carjacking is unsupported by precedent. *Moorer v. United States*, 868 A.2d 137, 141 (D.C. 2005).

"make it easier" (the appellate court's interpretation of the statute) to take Gathers' car or its contents. And the idea that Petitioner's taking of Gathers' vehicle made it easier to take Gathers' vehicle and its contents, is a patently absurd application of the UUV/COV statute.

Under a correct interpretation of the statute, there is no evidence in this record to support a finding that Petitioner took, used or operated the Stratus for the purpose of facilitating an assault on Mr. Gathers. As Waters testified, supported by the government's closing argument, the sole purpose for taking the Stratus that night was to joyride until they found another car to take. The evidence shows that they purposely avoided occupied cars. Likewise, there is no evidence that Petitioner took, used or operated *Gathers'* vehicle for the purpose of facilitating an assault on *Gathers*. At best, the evidence shows the exact opposite—that Petitioner assaulted Gathers in order to take his car. And again, according to Waters, they were just looking for another unoccupied car to steal. Therefore, the appellate court erred in finding sufficient evidence under the "to facilitate" prong because it applied an incorrect interpretation of the statute.

Petitioner requests that this Court grant his petition to correct the erroneous statutory interpretation by the D.C. Court of Appeals, which permitted jurors to convict him without finding a critical element of the offense and resulted in violating his due process rights by enhancing his sentence from "not more than 5 years" to "not less than 5 years."

II The DC Court of Appeals' Also Erred in Interpreting the UUV/COV Statute as Permitting Jurors to Find There Was Sufficient Evidence That The UUV of the Stratus And Gathers' Vehicle Occurred *During* A Crime of Violence Against Hampton Gathers, Again Leading to A Due Process Violation By Enhancing Petitioner's Sentence Substantially Where There Was Insufficient Evidence.

Even viewing the evidence in the light most favorable to the government that Petitioner "took, used or operated" the Stratus without the owner's consent and that he committed a "crime of violence" against Hampton Gathers, the evidence is clear that *before* Petitioner engaged in a "crime of violence," he had exited the Stratus and Khyree Waters had driven the vehicle away. During the assault on Gathers, Petitioner was not using, taking or operating the vehicle.

The appellate court relied on testimony that Waters, driving the Stratus, returned to the scene of the Gathers assault as support for finding that Petitioner "used, took or operated" the Stratus "during" the assault. The reasoning is flawed. First, as shown above, the mere use of a vehicle as transportation to the location of a previously unintended crime does not support a finding that Petitioner and Waters used the Stratus "during" the assault. Second, neither Waters nor Petitioner were using, taking or operating it "during" the assault. Both men had exited the Stratus and were assaulting Gathers. And, as shown above, Gathers' car was not taken until *after* the assault had *ended*.

Even assuming, *arguendo*, that robbery and carjacking can be considered as the "crimes of violence" in determining whether there is sufficient evidence to support the "during" prong of UUV/COV, (an assertion that is contrary to the prosecutor's theory at

trial), under the circumstances presented in this case the appellate court's reasoning leads to the same illogical construction of the statute as its reasoning on the "to facilitate" language. UUV, carjacking and robbery each require the "taking" of property. The word "during" is defined as "all along, all the while, as, at the same time as, . . .while..." http://legal-dictionary.thefreedictionary.com/during. Therefore, by asserting that Petitioner used, took or operated Gathers' vehicle while he was robbing or carjacking Gathers requires that the UUV/COV statute be construed as "***Petitioner took Gathers' car while he forcibly took Gathers' car***." Similarly nonsensical is the notion that using, taking or operating the Stratus occurred "during" a robbery or carjacking of Gathers. It was not physically possible for Petitioner to have been using, taking or operating the Stratus "while" taking Gathers' car because he was nowhere near the car.

Under the circumstances presented in this case and the government's own theory at trial, aggravated assault of Gathers was the only possible crime of violence that could conceivably have related to the charge of UUV/COV. However, the evidence shows (1) that the assault of Gathers had *ended before* Petitioner used, took or operated his vehicle; and (2) that the Stratus was not being used, taken or operated while Petitioner and Waters were assaulting Gathers.

The appellate court's erroneous interpretation of UUV "during" a crime of violence directly led to a substantial increase in Petitioner's sentence, which violated his Due Process rights.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his Petition.

Respectfully submitted,

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