NO.

IN THE SUPREME COURT OF THE UNITED STATES

MARK LEE MURRAY,

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), retroactively invalidates the residual clause of 18 U.S.C. § 924(c)(3)(B).

2. Whether general intent "intimidation," as used in the 1993 carjacking statute, is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) because that version of the statute does not require any intentional use, attempted use, or threat of violent physical force.

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Petition for Certiorari

Petitioner Mark Lee Murray respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Orders Below

The Ninth Circuit Court of Appeals' order denying Murray a certificate of appealability to appeal his motion for relief under 28 U.S.C. § 2255 is unpublished, *United States v. Murray*, No. 18-15566, Dkt #6 (9th Cir. June 25, 2018), and attached as Appendix A. The Ninth Circuit's order denying Murray's request for reconsideration of the certificate of appealability denial is unpublished, *United States v. Murray*, No. 18-15566, Dkt #8 (9th Cir. Aug. 3, 2018), and attached as Appendix B.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in this case on August 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). This Petition is timely under Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Title 18 of the United States Code, Section 2119, in effect in May 1993, reads as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so[.]

Reasons for Granting the Writ

There are two distinct parts to Murray's argument, with Circuits split as to the first, and Circuits erroneously applying this Court's precedent as to the second. Murray requests this Court grant certiorari as to:

1. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), retroactively invalidates the residual clause of 18 U.S.C. § 924(c)(3)(B); and

2. Whether general intent "intimidation," as used in the 1993 federal carjacking statute, is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) because that version of the statute does not require any intentional use, attempted use, or threat of violent physical force.

This Court has long attempted to unify the "crimes of violence" definition in federal criminal statutes. One of these statutes—18 U.S.C. § 924(c)—remains an open question, with discord rampant among circuit and district courts. As a result, Murray (and similarly situated defendants) is left serving an unconstitutional mandatory consecutive *twenty year* sentence. The Ninth Circuit Court of Appeals' decision in this case adds to the uncertainty and disagreement regarding what offenses qualify as crimes of violence under 18 U.S.C. § 924(c).

Circuit courts continue to erroneously hold that carjacking committed by intimidation—which does not require any specific intent or any violent force—qualifies as a crime of violence under § 924(c)'s elements clause. The "intimidation" decisions among at least the Fourth, Fifth, Ninth, and Eleventh Circuits do not correctly apply categorical analysis. These circuits broadly interpret "intimidation" for sufficiency purposes, affirming convictions for non-violent conduct that *does not*

involve the use, attempted use, or threats of violent force. These same circuits also find "intimidation" *always involves* the use, attempted use, or threats of violent force for § 924(c) analysis. Whether "intimidation" involves the use, attempted use, or threats of violent force has resulted in a fundamental conflation amongst the circuits and requires guidance from this Court.

This case thus presents a question of exceptional importance for defendants convicted under 18 U.S.C. § 924(c), which mandates consecutive sentences for the use of a firearm during a crime of violence. Breaking from this Court's precedent, circuits have created a violent crime where there is none. The Ninth Circuit joins several other circuits in ignoring the statutory elements of carjacking in order to find it a predicate crime of violence, exposing defendants to unconstitutional mandatory consecutive sentences. Certiorari is necessary to ensure all circuits appropriately exclude crimes committed by "intimidation" from § 924(c).

Statement of the Case

Petitioner Mark Lee Murray is serving a 35-year prison sentence, 20 years of which is unconstitutional. His 1993 federal carjacking conviction is not a crime of violence under 18 U.S.C. § 924(c)'s elements clause because it can be committed by intimidation without specific intent to harm. No use, attempted use, or threatened use of violent physical force was required for conviction. As such, the conviction can only be argued to qualify as a predicate crime of violence under § 924(c)'s now-void residual clause. Murray requests certiorari to correct the Ninth Circuit's deviation from established federal law on the requirements for § 924(c)'s elements clause.

A. A 20-year mandatory, consecutive sentence for use of a firearm during a carjacking.

A jury convicted Murray of carjacking under 18 U.S.C. § 2119 and use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c), for an offense occurring on May 10, 1993. CR 39.[1] In 1994, the district court sentenced Murray to 15 years (180 months) on the carjacking count, and 20 years (240 months) to be served consecutively and mandatorily on the § 924(c) count, for a total imprisonment term of 35 years (420 months). CR 45, 46.

Murray unsuccessfully sought relief from his conviction and sentence. The Ninth Circuit affirmed the conviction and sentence on direct appeal, and declined to issue a certificate of appealability for Murray's first motion to vacate under 28 U.S.C. § 2255, which he filed pro se. CR 55, 62, 63, 69, 70, 73, 74.

Murray is currently in federal custody with a projected release date of July 31, 2024.

B. Murray seeks relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

On June 26, 2015, this Court held that imposing an enhanced sentence under the residual clause of 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), violates the Constitution's guarantee of due process. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court subsequently held that *Johnson* announced a new

[1] The citation "CR" refers to the lower court record, specifically to the document's ECF number on the district court's docket record for *United States v. Murray*, No. 3:93-cr-00035-HDM-1 (D. Nev.).

substantive rule retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

Now represented by counsel, Murray filed a timely application in the Ninth Circuit Court of Appeals requesting leave to file a second or successive motion to vacate under 28 U.S.C. § 2255, in light of *Johnson*. The Ninth Circuit granted Murray's Application.

Murray's Motion to Vacate argued federal carjacking is not a crime of violence under 18 U.S.C. § 924(c), and its residual clause is void for vagueness. CR 77. The government opposed relief. CR 81. On February 12, 2018, the district court denied relief, holding federal carjacking is a crime of violence under 18 U.S.C. § 924(c). CR 88.

On April 17, 2018, this Court held the residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and Nationality Act's definition of aggravated felony, was void for vagueness and violated due process. *Dimaya*, 138 S. Ct. at 1215; *see* 18 U.S.C. § 16(b). The residual clause in 18 U.S.C. § 16(b) is identical to the residual clause in 18 U.S.C. § 924(c).

On May 23, 2018, Murray requested a certificate of appealability, arguing that the 1993 carjacking statute lacked the intent required by § 924(c)'s elements clause. The Ninth Circuit denied a certificate of appealability without an opinion on June 25, 2018. Appendix A. Murray requested the Ninth Circuit reconsider whether a certificate of appealability should issue on "whether Murray is entitled to

de novo resentencing under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because *Johnson* retroactively applies to § 924(c), and federal carjacking under the 1993 version of the statute is not a "crime of violence" under § 924(c)." The Ninth Circuit summarily denied reconsideration on August 3, 2018. Appendix B.

Argument

I. Certiorari is necessary to resolve the federal circuit split regarding whether *Johnson* retroactively invalidated the residual clause of 18 U.S.C. § 924(c)(3)(B).

Section 924(c) provides for a series of graduated, mandatory, consecutive sentences for using or carrying a firearm during and in relation to a "crime of violence." 18 U.S.C. § 924(c)(3). The statute defines "crime of violence" as:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). The first clause, § 924(c)(3)(A), is referred to as the elements clause. *See United States v. Coronado*, 603 F.3d 706, 709 (9th Cir. 2010). The second clause, § 924(c)(3)(B), is referred to as the residual clause. *Coronado*, 603 F.3d 706, 709.

In *Johnson*, this Court struck the ACCA's residual clause as unconstitutionally vague. 135 S. Ct. at 2557. This Court also held *Johnson*

retroactively applies to all defendants sentenced under the ACCA. *Welch*, 136 S. Ct. at 1265. The ACCA contains similar element and residual clauses:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B)(i)-(ii). It follows that § 924(c)'s residual clause is likewise unconstitutionally vague.

Additionally, on April 17, 2018, this Court held the residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and Nationality Act's definition of aggravated felony, was void for vagueness and violated due process. *Dimaya*, 138 S. Ct. at 1204; *see* 18 U.S.C. § 16(b). The residual clause in 18 U.S.C. § 16(b) is identical to 18 U.S.C. § 924(c)'s residual clause. This further supports Murray's argument that § 924(c)'s residual clause is unconstitutional.

Federal circuits are split as to two pertinent § 924(c) issues: whether *Johnson* applies to § 924(c)'s residual clause and whether voidance of § 924(c)'s residual clause retroactively applies to § 2255 challenges. Since issuance of *Dimaya*, the Fifth, Tenth, and D.C. Circuits hold that § 924(c)'s residual clause is void for vagueness under *Johnson*. *See United States v. Davis*, 903 F.3d 483 (5th

Cir. 2018) (direct appeal), *petition for cert. filed* (U.S. Oct. 3, 2018) (No. 18-431); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (direct appeal), *petition for r'hrg filed* (D.C. Cir. Aug. 31, 2018); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018) (direct appeal), *petition for cert. filed* (U.S. Oct. 3, 2018) (No. 18-426).

Taking the opposite view, the Second and Eleventh Circuits hold that § 924(c)'s residual clause is not void for vagueness. *See Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (en banc) (§ 2255 appeal); *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) (direct appeal), *petition for r'hrg filed* (2d Cir. Oct. 23, 2018).

The remaining circuits have not yet resolved whether *Johnson* applies to § 924(c)'s residual clause, either on direct appeal or retroactively, since *Dimaya*. The leading Ninth Circuit case on direct appeal is *United States v. Begay*, No. 14-10080 (9th Cir. supplemental briefing filed June 13, 2018). The Ninth Circuit recently held that § 2255 challenges to § 924(c)'s residual clause under *Johnson* are untimely because this Court has not yet specifically held that *Johnson* applies to § 924(c). *United States v. Blackstone*, 903 F.3d 1020, 1028-29 (9th Cir. 2018).[2]

The reasons set forth in *Dimaya* for voiding § 16(b)'s residual clause apply with equal force to § 924(c)'s residual clause. The § 924(c) residual clause requires courts to create an abstract hypothetical "ordinary case" under the statute in question, and determine "what threshold level of risk made any given crime a

[2] The defendant in *Blackstone* plans to seek rehearing en banc in the Ninth Circuit.

'violent felony.'" *Dimaya*, 138 S. Ct at 1213-1215; *see also Johnson*, 135 S. Ct. at 2557-58 (finding same vagueness bases for ACCA). The outcome is the same. Section 924(c)(3)(B) results in "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Dimaya*, 138 S. Ct. at 1216 (quoting *Johnson*, 135 S. Ct. at 2558). Furthermore, both the ACCA and § 924(c) impose mandatory prison sentences. "The prohibition of vagueness in criminal statutes . . . appl[ies] not only to statutes defining elements of crimes, but also to *statutes fixing sentences*." *Johnson*, 135 S. Ct. at 2556-57 (citing *United States v. Batchelder*, 442 U.S. 114 123 (1979)) (emphasis added). For these reasons, § 924(c)(3)(B)'s residual clause is unconstitutionally vague.

At present, there are approximately 68 pending cases being litigated by the Office of the Federal Public Defender in the District of Nevada alone—either at the Ninth Circuit or in the district court—seeking § 2255 relief from § 924(c) convictions and sentences in light of *Johnson*. This Court should therefore grant certiorari to resolve these questions of exceptional importance: whether *Johnson* invalidated the § 924(c) residual clause and whether that invalidation applies retroactively.

II. Certiorari is necessary to provide the proper interpretation of "intimidation" as used in the 1993 carjacking statute, which will determine whether it requires proof of an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c)(3)(A).

Murray's § 924(c) conviction and sentence rest on the district court's finding that the 1993 version of federal carjacking under 18 U.S.C. § 2119 is a crime of violence. The residual clause in § 924(c) no longer provides a basis to hold that the

1993 version of federal carjacking is a crime of violence, and thus the § 924(c) elements clause is the only available avenue. *See* Section I *infra* (requesting certiorari on this issue). But the 1993 version of the federal carjacking statute does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another," which the elements clause requires. 18 U.S.C. § 924(c)(3)(A). The 1993 conviction does not therefore meet the elements clause of § 924(c)(3)(A).

A. The categorical approach determines whether an offense is a crime of violence under 18 U.S.C. § 924(c).

To determine if an offense qualifies as a "crime of violence," courts must use the categorical approach to discern the "minimum conduct criminalized" by the statute at issue through an examination of cases interpreting and defining that minimum conduct. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013); *Almanza-Arenas v. Lynch*, 815 F.3d 469, 482 (9th Cir. 2016) (en banc). This Court first set forth the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and provided further clarification in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). The categorical approach requires courts to "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Mathis*, 136 S. Ct. at 2248.

An offense qualifies under the elements clause "if and only if the full range of conduct covered" by the statute includes the intentional violent force required by the elements clause. *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 853 (9th Cir. 2013). In doing so, "we must presume that the conviction 'rested upon nothing more

than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190-91 (alterations omitted). If the statute of conviction criminalizes some conduct that does involve intentional violent force and some conduct that does not, the statute of conviction does not categorically constitute a crime of violence. *Mathis*, 136 S. Ct. at 2248.

Violent force is required for a statute to meet § 924(c)'s elements clause. *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson 2010*"). In *Johnson 2010*, this Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140 (italicized emphasis in original). The use of force must also be intentional and not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016).

B. 1993 carjacking by intimidation does not require intentional violent physical force.

Carjacking under the 1993 statute can be committed "by force and violence or by intimidation." 18 U.S.C. § 2119 (1993). Applying the categorical approach, the least egregious conduct the statute covers is intimidation. Circuit courts, including the Ninth Circuit, apply the broad "intimidation" definition from the federal bank robbery statute, 18 U.S.C. § 2113(a), when conducting categorical analysis of federal carjacking. *See Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (en banc) (citing *United States v. Gutierrez*, 876 F.3d 1254, 1255-57 (9th Cir. 2017) (per curiam), *cert. denied*, 138 S. Ct. 1602 (2018); *United States v. Jones*, 854 F.3d 737, 740-41 & n.2 (5th Cir.), *cert. denied*, 138 S. Ct. 242 (2017); *United States v. Evans*, 848 F.3d 242, 246-48 (4th Cir.), *cert. denied*, 137 S. Ct. 2253 (2017)); *see also United*

States v. Randolph, 93 F.3d 656, 661 (9th Cir. 1996) (the "structure, language, and legislative history of section 2119 indicate that the . . . appropriate analogy is to [the federal bank robbery statute, 18 U.S.C. § 2113(a).").

For example, the Ninth Circuit in *Gutierrez* found the *current* carjacking statute qualified as a crime of violence under § 924(c)'s elements clause, relying on a previous decision holding bank robbery by intimidation so qualified. 876 F.3d at 1255-57. Specifically, *Gutierrez* held:

> To be guilty of carjacking "by intimidation," the defendant must take a motor vehicle through conduct that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of violent physical force. It is particularly clear that "intimidation" in the federal carjacking statute requires a contemporaneous threat to use force that satisfies *Johnson* because the statute requires that the defendant act with "the intent to cause death or serious bodily harm."

Id. at 1257 (quoting 18 U.S.C. § 2119).

Following *Gutierrez*, the Ninth Circuit held in a recent unpublished memorandum decision that the 1993 carjacking statute also qualifies as a crime of violence, again relying on a bank robbery decision:

> The version of the statute under which Newton was convicted is nearly identical to the amended version in *Gutierrez* except that the amended version substitutes an "intent to cause death or serious bodily harm" element for a "possessing a firearm" element. Newton attempts to distinguish *Gutierrez* because the version of the carjacking statute applicable to him lacks this mens rea requirement. But [*United States v.*] *Watson*[, 881 F.3d 782 (9th Cir. 2018), *cert. denied,* __ S. Ct. __, No. 18-5022 (Oct. 1, 2018)], determined *that* difference to be immaterial when it held that the parallel federal bank robbery statute, which still does not require an intent to cause serious

> bodily harm, was categorically a "crime of violence." 881 F.3d at 785. We are bound by those holdings.

United States v. Newton, 738 F. App'x 436 (9th Cir. Sept. 13, 2018) (per curiam) (Mem.).

The "intimidation" decisions among at least the Fourth, Fifth, Ninth, and Eleventh Circuits incorrectly apply the categorical analysis. These circuits broadly interpret "intimidation" for sufficiency purposes, affirming convictions including non-violent conduct that *does not* involve the use, attempted use, or threats of violent force. Yet, notwithstanding their broad definition of "intimidation," these same circuits find "intimidation" *always involves* the use, attempted use, or threats of violent force for § 924(c) analysis. The circuits cannot have it both ways.

Simply put, the finding that "intimidation" meets the § 924(c) elements clause—whether for carjacking or for bank robbery—is erroneous. To illustrate why, it is instructive to review a problematic bank robbery decision that currently controls the Ninth Circuit and which *Newton* relied on to find the 1993 carjacking statute is a crime of violence: *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied,* __ S. Ct. __, No. 18-5022 (Oct. 1, 2018).

Watson, a per curiam panel decision, failed to acknowledge this Court's prior case law interpreting and applying the federal bank robbery statute. *Watson*'s holdings create numerous conflicts with preexisting and controlling precedent as well as inter-circuit conflicts. Under pre-*Watson* precedent, the bank robbery statute (and the carjacking statute) delineates a categorically overbroad, indivisible offense that does not meet the 18 U.S.C. § 924(c)(3)(A) elements clause. *Watson* is

thus impermissibly and inexplicably inconsistent with prior, published case law. Resolution of these conflicts is necessary to bring comity to cases adjudicating whether "intimidation" may be deemed a crime of violence for purposes of federal convictions and sentencing.

1. Intimidation does not require the use or threat of violent physical force.

This Court explained in *Holloway v. United States*, 526 U.S. 1 (1999), a defendant could be found guilty of carjacking by intimidation in a "case in which the driver surrendered or otherwise lost control over his car" without the defendant ever using, attempting to use, or threatening to use physical force. *Id.* at 11. This Court explained that carjacking by intimidation is satisfied by "an empty threat, or intimidating bluff." *Id.*

The Ninth Circuit has ignored *Holloway*'s holding and instead relied on its own decision in *Watson*. In *Watson*, the Ninth Circuit held bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson* [*2010*] standard.'" 881 F.3d at 785 (citing *Johnson 2010*, 559 U.S. 133). But *Watson* failed to acknowledge this Court's teachings that: (1) violent force must be extreme, furious, severe, and strong, *Johnson 2010*, 559 U.S. at 140; and (2) "relatively minor" acts such as pinching, biting, hair pulling, pushing, grabbing, shoving, slapping, and hitting would not qualify as "violent" in a nondomestic context. *United States v. Castleman*, 134 S. Ct. 1405, 1411-12 (2014).

Intimidation for purposes of the federal bank robbery statute (or carjacking) can be, and often is, accomplished by a simple demand for money. The bank teller

may or may not even be afraid. Yet the *Watson*, *Gutierrez*, and *Newton* holdings assume an act of intimidation must necessarily involve the willingness to use violent force, and a willingness to use force is the same as a threat to use violent physical force. These assumptions are fallacious for three reasons.

First, a willingness to use force is not the same as a threat to do so. Indeed, the Ninth Circuit holds that "[a] willingness to use violent force is not the same as a threat to do so." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) (finding Massachusetts armed robbery statute does not qualify as a violent felony under the ACCA). The government argued in *Parnell* that anyone who robs a bank harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. The Ninth Circuit rejected the government's position, holding "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id.* *Watson* does not even address this distinction.

Second, intimidation does not require a willingness to use violent force. This Court has unequivocally held that carjacking by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway*, 526 U.S. at 11.

Third, even where a defendant is willing to use violent force, an intimidating act does not require such willingness be communicated to the victim. A victim's reasonable fear of bodily harm does not prove that a defendant "communicated [an] intent to inflict harm or loss on another." *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015) (defining "threat"). Indeed, an examination of bank robbery

affirmances reveals numerous cases where the facts did not include any intimidation by threatened violent force.

For example, in *United States v. Lucas*, 963 F.2d 243 (9th Cir. 1992), the defendant walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said "Put it in the bag." *Id.* at 244. The Ninth Circuit held that by "opening the bag and requesting the money," the defendant employed "intimidation." *Id.* at 248.

Additionally, in *United States v. Hopkins*, the defendant entered a bank and gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." 703 F.2d 1102, 1103 (9th 1983). When the teller said she had no hundreds or fifties, the defendant responded, "Okay, then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The trial evidence showed the defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.* The Ninth Circuit affirmed, holding "the threats implicit in [the defendant's] written and verbal demands for money provide sufficient evidence of intimidation to support the jury's verdict." *Id.*

Thus, if the defendants in *Lucas* and *Hopkins* were ever "willing" to use or threaten to use violent force, they did nothing to communicate or express that willingness. Those defendants never threatened to use violent force. *Lucas* and *Hopkins* demonstrate how bank robbery does not require the use or threatened use

of "violent" physical force. *See United States v. Doriety*, No. C16-0924-JCC, ECF No. 12 at 9 (W.D. Wash. Nov. 10, 2016) ("The Ninth Circuit has also rejected the notion that implicit in intimidation is a threat of actual violence." (citing *Parnell*, 818 F.3d at 980) (holding § 2113(a) bank robbery is not a crime of violence under U.S.S.G. § 4B1.2).

Other circuit affirmances of bank robbery convictions also illustrate that a threatened use of violent physical force is not required to sustain a conviction. For example, the Tenth Circuit affirmed a bank robbery by intimidation conviction where the defendant simply helped himself to the money and made neither a demand nor a threat to use violence. *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing).

The Fourth Circuit, in *United States v. Ketchum*, similarly upheld a bank robbery by intimidation conviction where the defendant affirmatively voiced no intent to use violence. 550 F.3d 363, 365 (4th Cir. 2008). To the contrary, the *Ketchum* defendant gave a teller a note that read, "These people are making me do this," and told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *Id.* Yet, the Fourth Circuit has *also* held for crime of violence purposes that "intimidation" necessarily requires the threatened us of violent physical force. *United States v. Evans*, 848 F.3d 242, 247 (4th Cir.),

cert. denied, 137 S. Ct. 2253 (2017) (holding the elements of carjacking under § 2119 satisfy § 924(c)(3)(A) and noting the court is "not aware of any case in which a court has interpreted the term 'intimidation' in the carjacking statute as meaning anything other than a threat of violent force").

The Fifth Circuit does not require any explicit threat and instead permits conviction for robbery by intimidation when a reasonable person would feel afraid—even where there is no weapon, no verbal or written threat, and the victims were not actually afraid. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987). Yet the Fifth Circuit *also* holds for crime of violence purposes that "intimidation" necessarily requires the threatened us of violent physical force. *United States v. Jones*, 854 F.3d 737, 740-41 & n.2 (5th Cir.), *cert. denied*, 138 S. Ct. 242 (2017) ("To hold otherwise would create a circuit split with at least two of our sister circuits.")

The Eleventh Circuit affirmed a robbery in *United States v. Kelley*, 412 F.3d 1240, (11th Cir. 2005), by analyzing whether the defendant engaged in "intimidation" from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant. *Id.* at 1244-45. In *Kelley*, a teller at a bank inside a grocery store left her station to use the phone and two men then laid across the bank counter to open the unlocked cash drawer, grabbing $961 in cash. *Id.* at 1243. The men did not speak to any tellers at the bank, did not shout, and did not say anything when they ran from the store. *Id.* The tellers testified they were "shocked, surprised, and scared," but did nothing to stop the robbery. *Id.* The defendant was found guilty of bank robbery by intimidation without ever issuing a

verbal or implied threat. *Id.* at 1245. Yet, the Eleventh Circuit *also* holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018).

The Fourth, Fifth, and Eleventh Circuits, just like the Ninth Circuit, apply a different non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction. But to find that bank robbery is a crime of violence, these circuits ignore the broad "intimidation" definition and instead find "intimidation" *always* requires a defendant to threaten the use of violent physical force. The inconsistent definitions of "intimidation" cannot stand.

Certiorari is necessary to direct circuits that "intimidation" as used in the federal carjacking statute does not require the *threatened* use of violent physical force sufficient to satisfy § 924(c)'s elements clause.

2. The 1993 version of federal carjacking is a general intent crime.

Not only does "intimidation" not require violent force, it is not required to be intentionally intimidating. Murray's carjacking offense conduct occurred in May 1993. Presentence Investigation Report at 3. At that time, 18 U.S.C. § 2119 defined an offender as:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so[.]

18 U.S.C. § 2119 (1993).

It was not until September 1994, i.e., *after* Murray committed the carjacking offense, that Congress added additional language to 18 U.S.C. § 2119. The amended statutory language defined an offender with the following italicized language:

> Whoever, *with the intent to cause death or serious bodily harm* takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so. . . .

See Violent Crime Control and Law Enforcement Act of 1994, Title VI, § 60003(a)(14), P.L. 103-322, 108 Stat. 1970 (Sept. 13, 1994) (emphasis added) (codified as amended at 18 U.S.C. § 2119 (1994)). When Murray violated the statute, the 1993 carjacking statute did not contain as an element "the intent to cause death or serious bodily harm."

The Ninth Circuit holds the 1993 carjacking statute to be a general intent crime. *United States v. Randolph* 93 F.3d 656 (9th Cir. 1996) (citing *United States v. Martinez*, 49 F.3d 1398, 1401 (9th Cir. 1995). In the Ninth Circuit, a finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. This is not enough to classify an offense as a crime of violence.

For example, in *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993), the Ninth Circuit held a jury need not find the defendant intentionally used force and violence or intimidation on the victim bank teller. The Ninth Circuit held a specific intent instruction was unnecessary because "the jury can infer the requisite

criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation." *Id.* Nowhere in *Foppe* did the Ninth Circuit suggest that the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see also United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (approving instruction stating intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear).

Other circuits' decisions agree: bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent. The Fourth Circuit holds "[t]he intimidation element of § 2113(a) is satisfied if an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (citation omitted). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Id.* The Eleventh Circuit similarly held in *United States v. Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d 1240, 1244 (11th Cir. 2005). Likewise, the Eighth Circuit expressly states that a jury may not consider the

defendant's mental state as to the intimidating character of the offense conduct *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

As a general intent crime, an act of intimidation can be committed negligently, which is insufficient to qualify as an intentional use of violent force. This Court explained in *Elonis* a threat is negligently committed when the mental state turns on "whether a 'reasonable person' regards the communication as a threat – regardless of what the defendant thinks[.]" *Elonis*, 135 S. Ct. at 2011. A statute encompasses a negligence standard when it measures harm as viewed from the perspective of a hypothetical "reasonable person," without requiring subjective awareness of the potential for harm. *Id.* For carjacking and bank robbery purposes, juries find "intimidation" based on the victim's reaction, not the defendants intent, thus intimidation can be negligently committed. Because the federal carjacking statute does not require an intentional mens rea, the statute does not define a crime of violence.

Numerous nonviolent scenarios would fit this type of carjacking: a defendant dressed as and pretending to be an armed uniformed police officer who seizes a car from the victim, or a defendant who tows a victim's car while claiming authority to do so and while possessing a firearm (even if unseen by the victim). Such nonviolent shows of authority would readily satisfy the intimidation requirement. *Cf. United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (express threats and threatening movement not required to demonstrate intimidation). But to

satisfy § 924(c)'s elements clause, a threat of physical force "requires some outward expression or indication of an intention to inflict pain, harm or punishment." *Parnell*, 818 F.3d at 980. The 1993 version of the carjacking statute has no such requirement.

Consequently, this Court should grant certiorari to correctly instruct circuit courts that general intent "intimidation," as used in the 1993 carjacking statute, does not require an intentional threat of violent physical force and therefore is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

C. The 1993 federal carjacking statute is indivisible and not a categorical crime of violence under 18 U.S.C. § 924(c).

The final step of categorical analysis is to determine if an overbroad statute is divisible or indivisible. *Mathis*, 136 S. Ct. at 2249. If the statute is divisible, the court may apply the modified categorical approach to determine if any of the divisible parts are crimes of violence and if the defendant violated a qualifying section of the statute. *Id.* Federal carjacking is overbroad, indivisible, and not a crime of violence.

If a criminal statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,'" the statute is divisible. *Descamps*, 570 U.S. 254, 263-64. In assessing whether a statute is indivisible, courts must assess whether the statute sets forth indivisible alternative means by which the crime could be committed **or** divisible alternative elements that the prosecution must select and prove to obtain a conviction. *Mathis*, 136 S. Ct. at 2248-49. Only when a statute is divisible may courts then review certain judicial documents to assess

whether the defendant was convicted of the alternative elements that meet the elements clause. *Descamps*, 570 U.S. at 262-63.

The carjacking statute does not list multiple alternative elements for a finding of guilt. Instead, § 2119 lists alternative means to commit carjacking: "by force and violence or by intimidation." A jury need not unanimously agree, nor must a defendant admit, *how* a federal carjacking was committed. *See United States v. Alsop*, 479 F.2d 65, 66 (9th Cir. 1973) (holding that indictment for robbery "by force and violence, or by intimidation" is one single charged offense) (citation omitted).

Because § 2119 lists alternative means, it is an indivisible statute. Since § 2119 is indivisible, the analysis is limited to the categorical approach. Under the categorical approach, carjacking under § 2119 is overbroad and not a crime of violence under § 924(c).

Conclusion

For the above reasons, Murray requests the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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