No. 18-6569

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

REPLY BRIEF FOR THE PETITIONER

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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), rendering challenges filed pursuant to 28 U.S.C. § 2255 within one year of *Johnson* timely; 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 the 1993 statute does not require any intentional use, attempted use, or threat of violent physical force.

The federal Circuits are split as to the first issue and erroneously apply this Court's precedent as to the second.

Because the court of appeals have failed to consistently or effectively resolve these issues, Murray remains in prison serving a 35-year sentence, 20 years of which is unconstitutional. Other defendants serving these unconstitutional § 924(c) sentences are timing out daily as they reach their release dates, illustrating Gladstone's adage that "justice delayed is justice denied." The time is ripe for final resolution of § 924(c)'s unconstitutional vagueness, retroactivity, and the timeliness of challenges thereto.

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) and whether challenges under 28 U.S.C. § 2255 filed within one year of *Johnson* are timely.

After Murray filed his petition for certiorari, this Court granted certiorari in *Davis v. United States*, No. 18-431 (Jan. 4, 2018), to address whether 18 U.S.C. § 924(c)(3)(B)'s residual clause is unconstitutionally vague. Should this Court find in

Davis that § 924(c)'s residual clause remains valid, Murray's arguments regarding the 1993 federal carjacking statute will be precluded. However, should this Court find in *Davis* that § 924(c)'s residual clause is void for vagueness, Murray presents the ideal companion case to *Davis* for at least two reasons.

First, the *Davis* case is a direct appeal and does not address whether voiding § 924(c) will retroactively apply to 28 U.S.C. § 2255 challenges. *See United States v. Davis*, 903 F.3d 483 (5th Cir. 2018). Murray's case—a challenge raised under 28 U.S.C. § 2255—squarely presents the issue of retroactivity. The government does not dispute that Circuits remain split as to whether a § 924(c) vagueness finding applies retroactively. Pet., pp. 8-9.[1] This split requires resolution by this Court, with Murray's case providing a ripe vehicle to do so.

Second, the *Davis* case will not address whether § 2255 challenges filed within one year of *Johnson* raised a timely challenge to § 924(c)'s vagueness. Circuits are also split on this timing issue. Pet., pp. 8-9. After Murray filed his petition for certiorari, the Ninth Circuit declined to rehear en banc its holding that post-*Johnson* § 2255 challenges to § 924(c)'s residual clause are untimely as this Court has not yet specifically held § 924(c)'s residual clause to be retroactively vague. *United States v. Blackstone*, 903 F.3d 1020, 1028-29 (9th Cir. 2018), *r'hrg denied* (9th Cir. Jan. 17, 2019) (No. 17-55023). Murray's case squarely presents the question of whether a § 2255 petition raising a *Johnson* claim is timely. The

[1] Murray cites to his Petition for a Writ of Certiorari as "Pet." and the government's Response Brief as "Gov. Resp."

government agrees that Murray filed his § 2255 motion seeking relief within a year of this Court's *Johnson* decision. Gov. Resp., p. 3. Thus, Murray's case would clarify timeliness for the hundreds (if not thousands) of similarly filed § 2255 petitions challenging § 924(c) convictions that remain pending in both district and circuit courts.

Murray's case presents questions of exceptional importance as to both § 924(c) vagueness retroactivity and timeliness of § 2255 challenges thereto, the resolution of which will lead to judicial consistency and efficiency. The government's assertion that Murray's case is of "limit[ed] prospective importance" is therefore incorrect and unpersuasive. Gov. Resp., p. 10.

For the last four years, those challenging § 924(c) convictions through § 2255 petitions have languished in prison, watching others receive relief under identical unconstitutional residual clause provisions in both the ACCA and 16(b). At present, the Office of the Federal Public Defender in the District of Nevada alone is litigating approximately 68 pending cases—in both the Ninth Circuit and district court—seeking § 2255 relief for defendants under *Johnson* who received convictions and sentences under § 924(c).

Circuit courts are deadlocked, requiring intervention and resolution by this Court. This Court should therefore grant certiorari to resolve these questions of exceptional importance: whether *Johnson* retroactively invalidated the § 924(c) residual clause and whether 28 U.S.C. § 2255 challenges filed within one year of *Johnson* are timely.

II. Certiorari is necessary to determine whether the 1993 federal carjacking statute 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).

The residual clause in § 924(c)(3)(B) no longer provides a basis to hold that 1993 federal carjacking (18 U.S.C. § 2119 (1993)) is a crime of violence; therefore, the § 924(c)(3)(A) elements clause is the only available avenue for its application. 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); *see Johnson v. United States*, 559 U.S. 113 (2010) ("*Johnson 2010*"). Nor does the 1993 statute require intent. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004). The 1993 conviction therefore does not meet the elements clause.

Carjacking under the 1993 statute can be committed "by force and violence or by intimidation." 18 U.S.C. § 2119 (1993). The government appears to agree that, applying the categorical approach, the least egregious conduct the statute covers is intimidation. Gov. Resp., pp. 6-12 (discussing only carjacking by "intimidation").

A. The 1993 carjacking statute lacks the requisite intentional mens rea to qualify as a crime of violence.

The government agrees this Court's precedent requires an intentional mens rea for crimes of violence. Gov. Resp., p. 8; Pet., pp. 12, 20-23; *Leocal*, 543 U.S. at 12-13. Under *Leocal*, a crime that can be committed negligently or recklessly does not qualify as a crime of violence. *Id.* .

The 1993 carjacking statute did not include the present statutory language requiring "the intent to cause death or seriously bodily harm." Pet., pp. 20-21. Instead, the 1993 carjacking statute read:

> 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). *After* Murray committed the underlying offense, Congress added 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. . . .

18 U.S.C. § 2119 (1994)).

The government claims the 1994 intent requirement is of no consequence to crime-of-violence analysis. Gov. Resp., pp. 6-7, 11-12. This argument is unpersuasive for at least six reasons.

First, the lack of intent in the 1993 federal carjacking statute is amplified by the Fourth, Eighth, Ninth, and Eleventh Circuits' holdings that robbery by intimidation focuses on the objective reaction of the victim, *not* on the defendant's intent. Pet., pp. 21-23 (discussing cases). The government does not address the victim-focused standard for finding robbery by intimidation and offers no explanation of how a victim-focused standard meets this Court's requirement that

the *defendant* intentionally used, attempted to use, or threatened to use force. *Leocal* 543 U.S. at 12-13.

Second, the government does not dispute that a threat is negligently committed when the mental state depends on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks." Pet., p. 23 (quoting *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015)). Under *Leocal*, a crime that can be committed negligently does not qualify as a crime of violence. 543 U.S. at 12-13. The government's reliance on cases focusing on the ordinary or reasonable person's reaction or impression of the defendant's conduct is insufficient to show the *defendant* possessed the necessary mens rea to commit carjacking. Gov. Resp., p. 8. Under the circuit courts' victim-focused standard, carjacking "by intimidation" can be committed negligently and therefore does not qualify under § 924(c)'s elements clause.

Third, the government inappropriately cites a number of recently denied *Johnson* challenges to § 924(c) and federal carjacking, both in this Court and in the courts of appeals. Gov. Resp., p. 5 n.1 (listing certiorari cases denied); p.7 (listing court of appeals cases). Nearly every *Johnson* challenge involved the current version of the statute, not the 1993 version. Only one case, *Stevens v. United States*, 138 S. Ct. 2676 (2018) (denying certiorari), involved a conviction under the 1993 federal carjacking statute. However, in *Stevens*, neither the petitioner nor the government acknowledged or addressed the differences between the 1993 statue and the current version.

Fourth, the government relies on several appellate decisions finding the *current* carjacking statute to be a crime of violence under § 924(c)'s elements clause in the context of *Johnson* challenges. Gov. Resp., pp. 7, 12. These post-*Johnson* findings, however, rest on the "intent to cause death or serious bodily harm" language not present in the 1993 statute. In sum, the current version requires both an intentional mens rea to cause harm and a taking by intimidation, while the 1993 statute does not have an intentional mens rea.

For example, the Ninth Circuit found the current carjacking statute qualified as a crime of violence under § 924(c)'s elements clause, specifically because the current "intent" requirements made the analysis "particularly clear:"

> 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."*

United States v. Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017) (emphasis added), *cert. denied*, 138 S. Ct. 1602 (2018).

The Eleventh Circuit relied on the current "intent to cause death or serious bodily harm" requirement to find the present carjacking statute is a crime of violence. *In re Smith*, 829 F.3d 1276 (11th Cir. 2016). Specifically, the Eleventh Circuit recognized the need for a conditional intent to cause physical harm under the current statute:

> [A] taking preceded by a threat will be insufficient unless there is also at least a conditional intent to inflict bodily harm. Hence, that the driver-victim may have surrendered his car based on an 'empty threat' or 'intimidating bluff,' [] by the

> defendant does not mean that the latter is guilty of carjacking unless he also intended to inflict physical harm on the victim.

Id. at 1281 n.5 (quoting *Holloway v. United States*, 526 U.S. 1, 11 (1999)). Circuits thus find the current statute requires both an intentional mens rea and a taking by intimidation.

Fifth, this Court's *Holloway* decision clarifies that the current carjacking statute requires specific conditional intent—an intent *not* present in the prior 1993 carjacking statute. 526 U.S. at 11-12. In *Holloway*, this Court held the current phrase "with the intent to cause death or serious bodily harm" requires proof of an intent to physically harm "at the moment the defendant demanded or took control over the driver's automobile." *Id.* at 12. This Court clarified that robbery "by intimidation" without the specific "intent to seriously harm or kill the driver if necessary to steal the car" would not satisfy the current statute:

> The statute's specific intent element does not, as petitioner suggests, render superfluous the statute's "by force and violence or by intimidation" element. While an empty threat, or intimidating bluff, would be sufficient to satisfy the latter element, such conduct, standing on its own, is not enough to satisfy § 2119's specific intent element. In a carjacking case in which the driver surrendered or otherwise lost control over his car without the defendant attempting to inflict, or actually inflicting, serious bodily harm, Congress' inclusion of the intent element requires the Government to prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car.

Id. at 11-12.

The prior 1993 carjacking statute did not require specific intent to "cause death or serious bodily harm." 18 U.S.C. § 2119 (1993). As noted in the *Holloway*

dissent by Justice Scalia, "the carjacker who hopes to obtain the car without inflicting harm" would not be guilty under the current statute's specific intent requirement. *Id.* at 20 (Scalia, J., dissenting). Under the prior 1993 version, however, such a defendant remains criminally liable of carjacking, even though that defendant lacks an intentional mens rea. Because the 1993 statute permitted conviction for a reckless or negligent mens rea, without a "conditional intent" mens rea to cause harm if necessary, the 1993 statute does not qualify as a crime of violence under § 924(c)(3)(A)'s elements clause.

Sixth, pre-*Johnson* cases addressing the 1993 carjacking statute do not defeat Murray's position. Gov. Resp., p. 7, 11 (citing *United States v. Moore*, 43 F.3d 568 (11th Cir. 1994), *cert. denied*, 516 US. 879 (1995), and *United States v. Mohammed*, 27 F.3d 815 (2d Cir.), *cert. denied*, 513 U.S. 975 (1994)). These cases pre-date several holdings by this Court that altered the crime-of-violence landscape: the *Holloway* decision clarifying the intent required for the current carjacking statute; the *Leocal* intentional mens rea requirement for the elements clause; the *Johnson 2010* violent physical force requirement for the elements clause; and the *Johnson* ruling invalidating the residual clause.

Furthermore, the *Mohammed* decision addressed double jeopardy concerns and did not address § 924(c)'s elements or residual clauses. 27 F.3d at 818-21. *Mohammed* summarily states: "[i]t is clear that a violation of section 2119, the carjacking statute, is a crime of violence within the meaning of section 924(c)," without explanation for this finding. *Id.* at 819. Instead, *Mohammed* discussed the

constitutionality of multiple sentences imposed under § 924(c)—not the elemental requirements of federal carjacking. *Id.*

As to the Eleventh Circuit's 1994 *Moore* decision, the dissenting opinion in *In re Smith*, issued in 2016, thoroughly sets forth the dangers in relying on *Moore* in light of this Court's subsequent holdings. *In re Smith*, 829 F.3d at 1281 (Pryor, J., dissenting). The *Moore* majority "relied at least in part on the [§ 924(c)(3)(B)] residual clause in concluding that carjacking qualifies as a crime of violence." *In re Smith*, 829 F.3d at 1282-83 (Pryor, J., dissenting) (discussing *Moore*, 43 F.3d at 572-73). In addition, the Eleventh Circuit, like the majority of circuits, determines if a defendant's acted "by intimidation" "from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant." *In re Smith*, 829 F.3d at 1283 (Pryor, J., dissenting) (citation omitted). Thus, the government's reliance on pre-*Holloway, Leocal, Johnson 2010,* and *Johnson* cases is unpersuasive.

Accordingly, this Court should grant certiorari to correctly instruct circuit courts that the 1993 carjacking statute does not require the requisite intentional mens rea and therefore is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

B. Intimidation does not require the use or threat of violent physical force necessary to qualify as a crime of violence.

The government fails address Murray's principle argument that the Fourth, Fifth, Ninth, and Eleventh Circuits apply a broad non-violent construction of "intimidation" when determining sufficiency of the evidence to sustain a carjacking

or robbery conviction. Pet., pp. 15-20. The government does not dispute these non-violent sufficiency findings.

These same Circuits ignore their own broad non-violent "intimidation" sufficiency findings when holding "intimidation" *always* requires a defendant to threaten the use of violent physical force for crime of violence purposes. Pet., pp. 16-20 (discussing cases). The inconsistent definitions of "intimidation"—a non-violent one for sufficiency analysis and a violent one for crime-of-violence analysis—cannot stand.

This Court's recent decision clarifying the "violent physical force" necessary under § 924(c)(3)(A)'s elements clause does not change Murray's analysis. *Stokeling v. United States*, 139 S. Ct. 544 (2019). In *Stokeling*, this Court found Florida's robbery statute requires "resistance by the victim that is overcome by the physical force of the offender" and thus categorically qualifies under the ACCA's elements clause at 18 U.S.C. § 924(e)(2)(B)(i). *Id.* at 549, 554. The 1993 federal carjacking statute, in contrast, does not require a defendant to overcome a victim's resistance. Therefore, *Stokeling* does not alter the "violent physical force" analysis in Murray's case.

Examples of non-violent robbery by intimidation set forth in Murray's petition for certiorari do not satisfy either the *Johnson 2010* or *Stokeling* requirements for "violent physical force." Pet., pp. 15-20. These examples do not contain an intent of violent physical force, a communicated threat of violent physical force, or resistance by the victims:

- A teller at a bank inside a grocery store left her station to use the phone and two men laid across the bank counter to open the unlocked cash drawer, grabbing $961. *United States v. Kelley*, 412 F.3d 1240, 1243 (11th Cir. 2005). The men did not speak to any tellers, did not shout, and did not say anything when they ran from the store. *Id.*

- A defendant dresses as and pretends to be an armed uniformed police officer when seizing a car from the victim.

- A defendant tows a victim's car while claiming authority to do so and while possessing a firearm.

- A 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." *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008).

- A defendant gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 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 defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.*

- A defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers. *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) Defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing. *Id.*

Stokeling reiterated that the modifier "physical" in § 924(c)(3)(A), "plainly refers to force exerted by and through concrete bodies—*distinguishing physical force, from, for example, intellectual force or emotional force.*" 139 S. Ct. at 552 (quoting *Johnson 2010*, 559 U.S. at 138, 140) (emphasis added). While the conduct in the above examples was no doubt emotionally or intellectually disturbing to the victims, the offenses did not involve any physical force or threat of physical force.

The government fails to explain how such non-violent robbery by intimidation could qualify under either *Johnson 2010* or *Stokeling*.

Thus, the Ninth Circuit's denial of relief to Murray is at odds with both this Court's precedent and its own ruling that 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." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016). The 1993 carjacking statute has no such requirement.

Accordingly, certiorari is necessary to direct circuit courts that "intimidation" as used in the 1993 federal carjacking statute does not require the *intentional threatened* use of violent physical force necessary under § 924(c)'s elements clause.

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 v. United States*, 136 S. Ct. 2243, 2249 (2016). The government does not offer any response to Murray's argument that the 1993 federal carjacking statute lists indivisible alternative means to commit carjacking: "by force and violence or by intimidation." 18 U.S.C. § 2119 (1993). A jury need not unanimously agree, nor must a defendant admit, *how* a federal carjacking was committed. Pet., pp. 24-25. Because the 1993 federal carjacking statute is indivisible, analysis is limited to the categorical approach and the 1993 federal carjacking statute is not a crime of violence under § 924(c)(3)(A)'s elements clause.

Conclusion

The Ninth Circuit Court of Appeals' denial of relief in Murray's case adds to the uncertainty and disagreement regarding: the fate of 18 U.S.C. §924(c)'s residual clause; if that clause is vague; whether vagueness applies retroactively; when post-*Johnson* challenges to § 924(c) convictions under 28 U.S.C. § 2255 are timely; and what offenses qualify as crimes of violence under § 924(c)'s remaining elements clause. Murray's case is an ideal companion to the *Davis* case that will address the viability of § 924(c)'s residual clause in a direct appeal. Murray's case presents a question of exceptional importance for defendants convicted under 18 U.S.C. § 924(c) that mandates consecutive sentences for the use of a firearm during a crime of violence.

In addition, Circuit courts continue to ignore this Court's precedent on federal carjacking. The 1993 federal carjacking statute does not require an intentional mens rea nor requires the use, attempted use, or threat of violent physical force. Courts of appeals continue to treat "intimidation" differently for sufficiency purposes than for crime-of-violence purposes. Although non-violent offenses are routinely affirmed as sufficient, the courts of appeal continue to hold carjacking is a crime of violence on the false assumption that carjacking by intimidation requires violent physical force. The resulting conflation amongst the Circuits requires guidance from this Court.

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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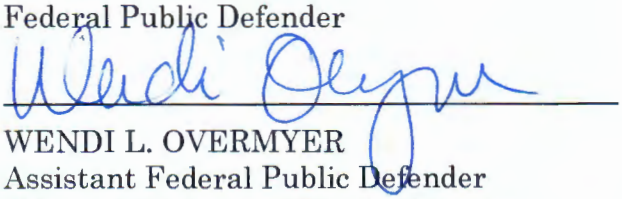

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