No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JAMES DENNIS LENIHAN, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: December 17, 2018

QUESTION PRESENTED

Whether the federal offense of carjacking, as defined by 18 U.S.C. § 2119, categorically qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s force clause?

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The Petitioner, James Dennis Lenihan III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The District Court's order denying Lenihan's 28 U.S.C. § 2255 motion is unpublished. It is reproduced in the Appendix. (App., *infra*, 1a-11a). The Court of Appeals' unpublished order summarily affirming the District Court's order is also reproduced in the appendix. (App., *infra*, 1b).

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's order summarily affirming the denial of Lenihan's 28 U.S.C. § 2255

Motion was filed on September 18, 2018. (App., *infra*, 1b). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code provides, in pertinent part:

> . . . any person who, during and in relation to a crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years . . .

The term "crime of violence is defined at 18 U.S.C. § 924(c)(3) as any felony that:

(A) has as an element, the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

STATEMENT OF THE CASE

1. During the early morning hours of June 28, 2004, Lenihan and an accomplice stole a pickup truck at gun point from a newspaper delivery man. After they drove away in the truck, the man flagged down a police officer. The officer immediately began pursuing the truck.

After a short pursuit through a residential neighborhood, Lenihan lost control of the truck and struck two parked vehicles. He and his accomplice jumped out of the truck and tried to elude the police on foot. The accomplice was arrested a short time later in the courtyard of a nearby church. During a search of the stolen pickup, police recovered a loaded Springfield 30-06 caliber rifle. A second rifle that had been thrown away during the car chase was also recovered. Lenihan managed to elude the police but was eventually arrested several weeks after the robbery.

2. In November of 2005, the Government filed a three-count Indictment alleging in Count I that Lenihan "knowingly used force, violence, or intimidation, to take from the person . . . a motor vehicle that had been transported, shipped, or received in interstate or foreign commerce, in violation of 18 U.S.C. §§ 2 and 2119(1)." Count II alleged that Lenihan "used . . . a firearm . . . in relation to a crime of violence which may be prosecuted in a court of the United States, that is carjacking, in violation of . . . § 924(c)(1)(A)(ii)." Count III alleged that Lenihan "having been convicted . . . of family member/partner assault . . . knowingly possessed, in and affecting interstate or foreign commerce, a firearm . . . in violation of 18 U.S.C. § 922(g)(1)."

Lenihan proceeded to trial the following April and was found guilty of all three counts in the Indictment. As a result of these convictions, he faced a guideline term of imprisonment on Counts I and III of 77 to 96 months and a mandatory consecutive 84-month sentence on Count II. The District Court sentenced Lenihan to a total term of 180 months consisting of 96 months on each of Counts I and III to be served concurrently and 84 months on Count II to be served consecutively to the sentences on Counts I and III. Following release from imprisonment, Lenihan was ordered to serve five years of supervised release.

3. Lenihan appealed his convictions and sentence. On appeal, he raised four issues: (1) whether the predicate misdemeanor conviction for Count III was imposed in violation of his right to counsel; (2) whether his sentence was unreasonable under *United States v. Booker*; (3) whether the district court erred in imposing a two point enhancement under U.S.S.G. § 3C1.2 for reckless endangerment during flight; and (4) whether there was sufficient evidence to support his convictions. The Ninth Circuit rejected his arguments and affirmed in two separate opinions. *See, United States v. Lenihan, III*, 488 F.3d 1175 (9th Cir. 2007); *United States v. Lenihan*, 238 Fed. App'x 198 (9th Cir. 2007)(unpublished).

4. Lenihan filed a 28 U.S.C. § 2255 motion on June 23, 2016. In his motion, he argued that he was entitled to relief because, in light of *Johnson v. United States,* 135 S. Ct. 2251 (2015), and *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015),[1] the offense of carjacking can no longer qualify as a "crime of violence" under § 924(c)(3). As a result, his sentence on the § 924(c) count was illegal and unconstitutional.

After ordering the Government to file a response and holding a hearing, the District Court denied Lenihan's motion and granted a certificate of appealability. In doing so, it determined that the offense of carjacking categorically qualifies as a crime of violence under § 924(c)(3)(A)'s force clause – a provision that was not affected by the decisions in *Johnson* and *Dimaya.* (App., *infra,* 1a-11a).

5. Lenihan filed a timely appeal and the Government moved for summary affirmance in light of *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017)(holding that the federal crime of carjacking categorically qualifies as a crime of violence under § 924(c)(3)(A)'s force clause). The Ninth Circuit granted the Government's motion and affirmed the District Court's order dismissing Lenihan's § 2255 motion. (App., *infra,* 1b).

Reasons for Granting the Writ

Following its decision in *Johnson v. United States,* this Court ruled, in *Sessions v. Dimaya,* that the residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague. The analysis of *Johnson* and *Dimaya* applies equally to cases arising under 18 U.S.C. § 924(c), thus removing the residual clause set forth in § 924(c)(3)(B) as a basis for Lenihan's conviction. Further, contrary to the Ninth Circuit's decision in *United States v. Gutierrez,* 876 F.3d 1254 (9th 2018), *cert. denied,* 138

[1] This Court affirmed the Ninth Circuit's decision in *Dimaya* on April 17, 2018. *See, Sessions v. Dimaya,* 138 S.Ct. 1204 (2018).

S.Ct. 1602 (2018), federal carjacking, the predicate for Lenihan's § 924(c) conviction, is not categorically a crime of violence under § 924(c)(3)(B)'s force clause. Because carjacking does not qualify as a crime of violence under the force clause, Lenihan is actually innocent of brandishing a firearm during a crime of violence, and the Ninth Circuit erred in denying his § 2255 motion. To remedy this error, this Court should grant certiorari to overrule *Gutierrez* and reverse the Ninth Circuit's order denying Lenihan's 28 U.S.C. § 2255 motion.

Carjacking does not qualify as a crime of violence under § 924(c)(3)(A)'s "force" clause.

In denying Lenihan's § 2255 motion, the Ninth Circuit relied on its decision in *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017). As noted earlier, in *Gutierrez*, the Ninth Circuit concluded that carjacking, as defined in 18 U.S.C. § 2119, categorically qualifies as a crime of violence under § 924(c)(3)(A)'s force clause. This Court should grant certiorari in this case, reverse *Gutierrez*, and reverse the Ninth Circuit's Order denying Lenihan's § 2255 motion.

To qualify as a crime of violence under § 924(c)(3)(A)'s force clause, an offense must require proof, as a necessary element, that the defendant used, attempted to use, or threatened to use physical force. *Johnson(Curtis) v. United States*, 559 U.S. 133 (2010). Force, in this context, refers to "violent force–that is, force capable of causing physical pain or injury to another person." *Id.* at 140. It must be intentionally applied, not just recklessly or negligently. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004).

A person violates the carjacking statute if he, "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." 18 U.S.C. § 2119. Here, the Indictment charged that Lenihan "knowingly used force . . . to take from the person . . . a motor vehicle . . . transported . . . in interstate commerce."

Because carjacking can be committed by mere intimidation, it cannot be properly classified as a crime of violence. Intimidation does not require an intentional threat of force, nor does it require a threat of violent force.

This Court has held that to constitute use of force for purposes of the crime of violence definition, the use of force must be volitional; a statute that allows a conviction to be premised on a reckless or negligent use of force (or a reckless or negligent threatened use of force) is not a crime of violence. See, e.g., *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) (citing *Leocal,* 543 U.S. at 9-13 and interpreting the crime of violence definition at 18 U.S.C. § 16 to require intent); *see also United States v. Serafin*, 562 F.3d 1105, 1108 (9th Cir. 2009) (applying *Leocal's* gloss on 18 U.S.C. § 16 to the identically worded definition of crime of violence found at 18 U.S.C. § 924(c)(3)).

But "intimidation" for purposes of the carjacking statute does not require an intentional threat of force. Cases interpreting the term "intimidation" in the federal bank robbery statute, 18 U.S.C. § 2113(a), are instructive because both statutes interpret the same phrase: a taking "by force and violence or by intimidation." In the robbery context, this Court has held that "[t]he determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions. . . . To take, or attempt to take, 'by intimidation' means willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Alsop,* 479 F.2d 65, 67 n.4 (9th Cir. 1973). Whether the defendant "specifically intended to intimidate . . . is irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). Because a defendant may be convicted of federal carjacking even though he had no intention of instilling fear, carjacking cannot be a crime of violence under the force clause. *Leocal*, 543 U.S. at 9-13.

Additionally, federal carjacking does not require proof that the defendant actually threatened to use violent physical force. In *Johnson v. United States*, 559 U.S. 133, 140 (2010), this Court held that the phrase "physical force" in ACCA's "very similar" definition of "violent felony" means "violent force-that is, force capable of causing physical pain or injury to another person."

Nothing in the term "force" or "intimidation" requires a threat of violent physical force, however. Again, by analogy to the bank robbery statute, intimidation is satisfied even where there is no explicit threat at all, let alone the threat of violent force. *See United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]' are not required for a conviction for bank robbery by intimidation.").

A threat of physical force, as would satisfy the force clause "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). Neither federal bank robbery nor federal carjacking has any such requirement. Because carjacking can be satisfied by a person saying that they would use whatever force was necessary – be it a tap on the shoulder or a gunshot – to accomplish the carjacking, and because not even *that* willingness need to be communicated to the victim, carjacking does not have as an element the use or threatened or attempted use of force.

Nor does the fact that carjacking requires "the intent to cause death or serious bodily harm" mean that it necessarily requires the threatened use of physical force. This Court has held that this element is met so long as the individual has a conditional intent – an intent to use force "if that action had been necessary to complete the taking of the car." *Holloway v. United States*, 526 U.S.

966, 972 (1999) (emphasis added). But once again, as lower courts have recognized, an uncommunicated willingness or readiness to use force if necessary is not a threat to do so. *Parnell*, 818 F.3d at 980.

In sum, a conviction for carjacking under 18 U.S.C. § 2119 does not require proof that the defendant intentionally used or threatened violent physical force as required by *Leocal* and *Johnson*. Because § 924(c)(3)(B)'s residual clause is unconstitutionally vague and because federal carjacking cannot qualify as a crime of violence under § 924(c)(3)(A)'s force clause, Lenihan's § 924(c) sentence was imposed in violation of the constitution and is unlawful.

Conclusion

The Petitioner, James Daniel Lenihan III, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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December 17, 2018