No. 18-8393

IN THE SUPREME COURT OF THE UNITED STATES

IRMA OVALLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-19) that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Because that question is currently pending before this Court in United States v. Davis, No. 18-431 (argued Apr. 17, 2019), petitioner suggests (Pet. 19) that her petition for a writ of certiorari should be held for Davis and then disposed of as appropriate in light of the Court's decision in that case. But because petitioner's conviction and sentence will be unaffected by the resolution of Davis, the petition should be denied.

1. Following a guilty plea in the Northern District of Georgia, petitioner was convicted of several offenses, including

attempted carjacking, in violation of 18 U.S.C. 2119, and using or carrying a firearm during and in relation to a "crime of violence" -- namely, the attempted carjacking -- in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 61; C.A. App. 20, 22, 25. Petitioner did not appeal. Pet. App. 2.

In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which she contended that attempted carjacking does not qualify as a crime of violence under Section 924(c). Pet. App. 62. Section 924(c)(3) defines a "crime of violence" as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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)(B). Petitioner argued that attempted carjacking does not qualify as a crime of violence under Section 924(c)(3)(A), and that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in Samuel Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 135 S. Ct. at 2557. See Pet. App. 62-63. The district court denied petitioner's motion. Id. at 63.

2. a. The court of appeals affirmed. Pet. App. 60-68. The court determined that attempted carjacking qualifies as a crime of violence under Section 924(c)(3)(A) because it requires at least the attempted use or threatened use of physical force. Id. at 67-68. The court further determined, in the alternative, that attempted carjacking qualifies as a crime of violence under Section 924(c)(3)(B), which it found not to be unconstitutionally vague under Samuel Johnson. Id. at 63-67.

b. After the court of appeals issued its decision, this Court held in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), that the definition of a "crime of violence" in 18 U.S.C. 16(b) -- the language of which is nearly identical to Section 924(c)(3)(B) -- is unconstitutionally vague. See Dimaya, 138 S. Ct. at 1214-1215. In light of Dimaya, the court of appeals granted rehearing en banc in petitioner's case to determine whether Section 924(c)(3)(B) is void for vagueness. See Pet. App. 7-22.

The en banc court determined that Section 924(c)(3)(B) is not unconstitutionally vague. Pet. App. 16-22. The court observed that Dimaya had invalidated Section 16(b) because that statute applies to the classification of prior convictions, a context that was understood to require judges to hypothesize the "ordinary case" of a crime as a categorical matter rather than look to the facts of the defendant's actual crime. Id. at 10-12 (citation omitted). The court reasoned, however, that because Section 924(c)(3)(B)

applies solely in the context of a current offense, the facts of which must be found by a jury beyond a reasonable doubt, it should be interpreted to require the jury to determine whether the defendant's crime, as committed, "by its nature" involved a "substantial risk" that force would be used "in the course of committing the offense." Id. at 16-20 (quoting 18 U.S.C. 924(c)(3)(B)). The court explained that such a circumstance-specific approach avoided the constitutional infirmity created by the "ordinary case" approach in the context of prior convictions. Id. at 21.

Applying the circumstance-specific approach, the en banc court found that the "real-life details" of petitioner's crime -- in which petitioner and her confederates "approached a family getting out of their minivan, demanded the keys, hit the family's 13-year-old child in the face with a baseball bat, and then, in making their escape, fired an AK-47 assault rifle at the family and a Good Samaritan who had come to their aid" -- clearly satisfied the definition of a "crime of violence" in Section 924(c)(3)(B). Pet. App. 21. The en banc court remanded petitioner's case to the panel for further proceedings. Id. at 22.

c. The panel "reinstat[ed]" its prior holding that attempted carjacking also "qualifies as a crime of violence under [Section] 924(c)(3)(A)'s elements clause." Pet. App. 1. The court

observed that the elements of carjacking "categorically" require proof of the use, attempted use, or threatened use of physical force. Id. at 3-4. The court further explained that attempted carjacking requires both the intent to use such force and a "substantial step" toward doing so -- which, like the completed offense, necessarily requires at least the attempted or threatened use of force. Id. at 4-5; see id. at 4 ("We can conceive of no plausible means by which a defendant could commit attempted carjacking absent a threatened or attempted use of force against a person."). And the panel observed that its determination that attempted carjacking categorically qualifies as a crime of violence under Section 924(c)(3)(A) provided an "independent and alternative ground," separate and apart from the en banc court's determination that petitioner's offense qualified as a crime of violence under a circumstance-specific application of Section 924(c)(3)(B), for affirming petitioner's Section 924(c) conviction. Id. at 5.

3. The court of appeals correctly determined that attempted carjacking qualifies as a crime of violence under Section 924(c)(3)(A). A person commits carjacking if, "with the intent to cause death or serious bodily harm," he "takes a motor vehicle * * * from the person or presence of another by force and violence or by intimidation." 18 U.S.C. 2119. For the reasons stated in the government's brief in opposition to the petition for a writ of

certiorari in Cooper v. United States, 139 S. Ct. 411 (2018), carjacking categorically qualifies as a crime of violence under Section 924(c) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See Br. in Opp. at 6-9, Cooper, supra (No. 17-8844).[1] Every court of appeals to have considered the question has so held. See id. at 7-8. And this Court has recently and repeatedly denied petitions for writs of certiorari raising that issue, as well as a related issue arising under the federal bank robbery statute, 18 U.S.C. 2113, which has operative language similar to the carjacking statute's.[2]

Because carjacking categorically qualifies as a crime of violence under Section 924(c)(3)(A), attempted carjacking likewise qualifies under that provision. See Pet. App. 4-5. Numerous courts of appeals have held that an attempt to commit a crime that requires the use, attempted use, or threatened use of physical

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[1] We have served petitioner with a copy of the government's brief in opposition in Cooper.

[2] See, e.g., Williams v. United States, No. 18-7470 (Apr. 29, 2019); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Cooper, supra, No. 17-8844; Lindsey Johnson v. United States, 139 S. Ct. 70 (2018) (No. 17-8632); Henry v. United States, 139 S. Ct. 70 (2018) (No. 17-8629); Leon v. United States, 139 S. Ct. 56 (2018) (No. 17-8008); Stevens v. United States, 138 S. Ct. 2676 (2018) (No. 17-7785); Chaney v. United States, 138 S. Ct. 2675 (2018) (No. 17-7592); Dial v. United States, 138 S. Ct. 647 (2018) (No. 17-6036); Charles Johnson v. United States, 138 S. Ct. 61 (2017) (No. 16-8415); Evans v. United States, 137 S. Ct. 2253 (2017) (No. 16-9114); In re Fields, 137 S. Ct. 1326 (2017) (No. 16-293).

force is itself a "crime of violence" under Section 924(c)(3)(A) and similarly worded provisions. See Arellano Hernandez v. Lynch, 831 F.3d 1127, 1132 (9th Cir. 2016) ("The 'attempt' portion of Arellano Hernandez's conviction does not alter our determination that the conviction is a crime of violence [under 18 U.S.C. 16(a)]. We have 'generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of violence."') (citation omitted), cert. denied, 137 S. Ct. 2180 (2017); see also, e.g., United States v. Armour, 840 F.3d 904, 907-909 (7th Cir. 2016) (holding that attempted federal bank robbery is a "crime of violence" under Section 924(c)(3)(A)); United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir.) (O'Connor, Ret. J.) (same for offense of attempting to "set[] fire to, damage[], destroy[] . . . or wreck[]" an aircraft with people on board) (brackets in original), cert. denied, 569 U.S. 912 (2013); cf. United States v. Alexander, 809 F.3d 1029, 1033 (8th Cir. 2016) (holding that attempted second-degree assault under Missouri law is a "violent felony" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i)), cert. denied, 137 S. Ct. 1608 (2017).

As the Seventh Circuit has explained, "[a]n attempt conviction requires proof of intent to carry out all elements of the crime, including, for violent offenses, threats or use of violence," as well as a "substantial step toward completion of the crime." Armour, 840 F.3d at 910 n.3; see Pet. App. 4 (same). A

person who takes a substantial step toward committing such an inherently violent offense is properly understood to have at least attempted or threatened the use of violent force within the meaning of Section 924(c)(3)(A). And this Court has repeatedly denied review of petitions for writs of certiorari raising the question whether attempts to commit carjacking or other violent offenses qualify as crimes of violence under Section 924(c)(3)(A).[3]

4. Petitioner does not seek review of the court of appeals' "independent and alternative," Pet. App. 5, determination that attempted carjacking qualifies as a crime of violence under Section 924(c)(3)(A). See Pet. 1-19. Nor does she suggest any disagreement among the courts of appeals on that issue, which reflects uniform circuit law that this Court has repeatedly declined to review. See notes 2-3, supra. Accordingly, no reason

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[3] See, e.g., Sosa v. United States, No. 18-8333 (Apr. 15, 2019) (attempted murder in aid of racketeering); Myrthil v. United States, 139 S. Ct. 1164 (2019) (No. 18-6009) (attempted Hobbs Act robbery); St. Hubert v. United States, 139 S. Ct. 246 (2018) (No. 18-5269) (same); Corker v. United States, 139 S. Ct. 196 (2018) (No. 17-9582) (same); Beavers v. United States, 139 S. Ct. 56 (2018) (No. 17-8059) (same); Berry v. United States, 138 S. Ct. 2665 (2018) (No. 17-8987) (attempted carjacking); Chance v. United States, 138 S. Ct. 2642 (2018) (No. 17-8880) (attempted Hobbs Act robbery); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248) (same); Sampson v. United States, 138 S. Ct. 1583 (2018) (No. 17-8183) (same); Robbio v. United States, 138 S. Ct. 1583 (2018) (No. 17-8182) (same); James v. United States, 138 S. Ct. 1280 (2018) (No. 17-6295) (same); Galvan v. United States, 138 S. Ct. 691 (2018) (No. 17-6711) (attempted carjacking); Wheeler v. United States, 138 S. Ct. 640 (2018) (No. 17-5660) (attempted Hobbs Act robbery).

exists to consider petitioner's contention (Pet. 6-19) that the alternative "crime of violence" definition in Section 924(c)(3)(B) is unconstitutionally vague, or to hold the petition for a writ of certiorari pending this Court's disposition of Davis, supra. Davis presents no issue concerning the interpretation of Section 924(c)(3)(A), and thus the Court's resolution of Davis will not resolve any question that will affect the outcome of this case.

The petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

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[4] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.