NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

JOASSAINT JOSIAH ARISTIL,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether carjacking in violation of 18 U.S.C. § 2119, which may be committed by intimidation, requires an element "the use, attempted use, or threatened use of physical force against the person or property of another," within the meaning of 18 U.S.C. § 924(c)(3)(A).

INTERESTED PARTIES AND RELATED PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

The following proceedings are directly related to the case before this Court:

United States v. Joassaint Josiah Aristil, 0:18-cr-60071-BB (S.D. Fl. Oct. 16, 2018) (DE 31 (Final Judgment))

United States v. Joassaint Josiah Aristil, No. 18-14584, 2019 WL 4447207 (11th Cir. Sept. 17, 2019).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Guideline

Other Authorities

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Joassaint Josiah Aristil respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-14584 in that court on September 17, 2019. *United States v. Aristil*, No. 18-14584, 2019 WL 447207 (11th Cir. Sept. 17, 2019).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-3).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on September 17, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c) provides in pertinent part:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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—
>
> ...
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years ....
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as 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. § 2119 provides in pertinent part:

> 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, shall—
>
> (1) Be fined under this title or imprisoned not more than 15 years, or both….

STATEMENT OF THE CASE

Petitioner Joassaint Aristil was charged in a two-count indictment for offenses arising from a February 16, 2018 carjacking. Count 1 charged Mr. Aristil with federal carjacking, in violation of 18 U.S.C. § 2119, and Count 2 charged him with brandishing a firearm during crime of violence — the carjacking — in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

Mr. Aristil moved to dismiss the § 924(c) charge, arguing that "Count 2 fails to state an offense because carjacking as defined by § 2119 does not qualify as a 'crime of violence' as a matter of law." (DE 17:2). Mr. Aristil identified two potentially-applicable definitions of "crime of violence" in 18 U.S.C. § 924(c)(3): the "use-of-force clause" in § 924(c)(3)(A), and the "residual clause" in § 924(c)(3)(B). (DE 17). The residual clause, he urged, was unconstitutional in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which struck down identical language in 18 U.S.C. § 16(b) as void-for-vagueness. He also argued that carjacking failed to qualify under the use-of-force clause "because it can be violated without the use, attempted use, or threatened use of violent physical force." (DE 17:2). Specifically, Mr. Aristil argued that carjacking encompassed offenses committed "by force and violence or by intimidation," meaning that it did not categorically require the use of violent force. The over-breadth, he argued, stemmed both from the element's lack of *mens rea*, thus not requiring the "use" of force, and from the fact that the force involved in intimidation need not include physical threatening. (DE 17).

Mr. Aristil pled guilty to both counts of the indictment. In a stipulated factual proffer, the parties agreed that Mr. Aristil committed a carjacking in a gated apartment complex in Oakland Park, Florida. (DE 23:1). The complex's security cameras captured Mr. Aristil approaching the victim while brandishing a firearm. (DE 23:1). Mr. Aristil took the victim's purse, car keys, and a gold chain from around her neck, and fled the complex in her car. (DE 23:2). Mr. Aristil eventually admitted to this conduct in statements to law enforcement. (DE 23:17). The district court accepted Mr. Aristil's plea, and adjudicated him guilty on both counts. (DE 36:21-22). The district court subsequently denied Mr. Aristil's motion to dismiss the indictment as moot in light of his guilty plea to the charged offense. (DE 25).

Prior to sentencing, the United States Probation Office prepared a Presentence Investigation Report ("PSR"). (DE 29). The PSR calculated Mr. Aristil's guidelines range at offense level of 19, and assessed four criminal history points, establishing a criminal history category of III, resulting in an advisory guidelines range of 37 to 46 months' imprisonment for Count I. (DE 29:14). However, his conviction on Count 2 — the § 924(c) conviction — carried a mandatory, consecutive seven-year sentence not included in the guidelines calculation. (DE 29:7). Neither party submitted any objections to the PSR or its guidelines calculations, and the case proceeded to sentencing.

At sentencing, counsel for Mr. Aristil urged that the seven-year sentence mandated by the § 924(c) conviction was sufficient punishment alone. (DE 37:10). The government disagreed, urging the court to impose 121 months, focusing on the

traumatic impact of the offense on the victim. (DE 37:11-14). The district court adopted the government's recommended sentence, and imposed a bottom-of-the-guidelines sentence of 37 months for Count 1's carjacking conviction, and a consecutive 84-month sentence for the § 924(c) conviction in Count 2. (DE 31).

Mr. Aristil appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit. On appeal, Mr. Aristil reasserted his challenge to his conviction under 18 U.S.C. § 924(c), arguing once again that the residual clause in 18 U.S.C. § 924(c)(1)(B) was unconstitutionally vague, and that his carjacking offense did not satisfy the "use-of-force" clause of 18 U.S.C. § 924(c)(1)(A). Additionally, Mr. Aristil challenged, for the first time, the assessment of one criminal history point for a shoplifting offense he had committed prior to his eighteenth birthday, and more than five years prior to the instant offense. (*See* PSI ¶ 27; *see also* U.S.S.G. § 4A1.2(d)(2)).

The opinion below

On September 17, 2019, **t**he Eleventh Circuit issued an unpublished opinion affirming in part, and vacating in part. *United States v. Aristil*, No. 18-14584, 2019 WL 4447207 (11th Cir. Sept. 17, 2019). By that time, this Court had issued its decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), and held that the residual clause in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. Notwithstanding *Davis*, the Eleventh Circuit held that Mr. Aristil's challenge to his conviction failed because it had "repeatedly concluded that carjacking in violation of § 2119 qualifies as a crime of violence under the elements clause of § 924(c)(3)." *See United States v.*

Aristil, 2019 WL 4447207 at *1 (11th Cir. Sept. 17, 2019) (citing *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016)).

The Eleventh Circuit agreed, however, that the district court plainly erred by assessing a criminal history point for Mr. Aristil's prior shoplifting offense. *Aristil*, 2019 WL 4447207 at *2. The Eleventh Circuit therefore vacated Mr. Aristil's sentence in part, and remanded the case "for the district court to resentence Aristil under the correct Guideline range." *Id.* On December 13, 2019, Mr. Aristil was re-sentenced to 33 months' imprisonment on count 1, to be followed by the consecutive 84-month sentence on count 2. (DE 47).

REASONS FOR GRANTING THE WRIT

The Court should grant review to decide whether intimidation requires "the use, attempted use, or threatened use of physical force against the person or property of another," within the meaning of 18 U.S.C. § 924(c)(3)(A).

This case raises a question of exceptional importance which has not been, but should be, addressed by the Court: whether an act of "intimidation" categorically requires the "use, attempted use, or physical against the person or property of another." Although carjacking, at first blush, certainly sounds "violent," a closer review of its elements confirms that 18 U.S.C. § 2119 does not categorically require the "use" or threatened use of "force," as those terms have been defined by the Court in the relevant context. Therefore, the Court's interest in ensuring the uniform application of the federal courts' ubiquitous "crime of violence" jurisprudence provides a compelling reason to grant review.

A. The categorical approach

Under 18 U.S.C. § 924(c)(1)(A)'s "use-of-force" clause, an offense is a "crime of violence" if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The term "physical force" in this context means "violent force," *i.e.*, "strong physical force" "capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (analyzing definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(i)). *See also Leocal v. Ashcroft*, 543 U.S. 1 (2004) ("The ordinary meaning of this term, combined

with [18 U.S.C.] § 16's emphasis on the use of physical force against another person ... suggests a category of violent, active crimes ...").

In determining whether an offense satisfies this definition, sentencing courts employ the categorical approach, which involves "compar[ing] the elements of the statute forming the basis of the defendant convictions" with the elements listed in the statute. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). *See also United States v. Davis*, 139 S. Ct. 2319 (2019) (holding that 18 U.S.C. § 924(c)(3)(B) required the categorical approach). Application of the categorical approach to 18 U.S.C. § 2119 yields the conclusion that carjacking is not a "crime of violence" under § 924(c)(1)(A).

B. Intimidation does not require the use or threatened use of force.

The federal carjacking statute, 18 U.S.C. § 2119, in pertinent part, provides:

> 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 [shall be punished in accordance with the remainder of the statute].

The offense thus requires proof of the following elements : (1) the taking of a motor vehicle, (2) transported in interstate or foreign commerce, (3) from the person or in the presence of another, (4) "by force and violence," ***or*** "by intimidation," (5) "with the intent to cause either death or serious bodily harm. As the emphasized language shows, the "force and violence" and "intimidation" components of the carjacking statute represent alternative means of satisfying a single element.

Accordingly, the statute is indivisible. *See United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) (discussing similar language in federal bank robbery statute). Title 18 U.S.C. § 2119 thus fails to qualify as a "crime of violence" because intimidation (1) does not require the use, attempted use, or threatened use of ***violent physical force*** and (2) does not require the ***intentional*** use, attempted use, or threatened use of the same.

As defined by Merriam-Webster, to "intimidate" means "to make timid or fearful," or "to compel or deter by or as if by threats." *See* http://www.merriam-webster.com/dictionary/intimidation (reviewed Dec. 16, 2019). Under federal law, however, whether a defendant engaged in intimidation is viewed objectively. Thus, as one Eleventh Circuit judge noted: "[a]lthough on its face, the term 'intimidation' seems coterminous with 'threatened use of physical force' as it appears in the elements clause, ... precedent indicates that may not necessarily be the case." *In re Smith*, 829 F.3d 1276, 1293 (11th Cir. 2016) (Jill Pryor, J., dissenting). This is because "whether a defendant engaged in 'intimidation' is analyzed from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant." *Id*. The Eleventh Circuit's pattern jury instructions make this clear: to take "by intimidation," simply requires saying or doing something "that would make an ordinary person fear bodily harm. It doesn't matter whether the victim in [that particular] case actually felt fear." *See* Eleventh Circuit Pattern Jury Instructions Criminal 78 (West 2010 ed.)

Federal cases interpreting the federal bank robbery statute (18 U.S.C. § 2113(a)) — which has an identical intimidation element — uniformly hold that intimidation occurs when "an ordinary person in the [victim's position] reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Woodrop*, 86 F.3d 359, 364 (4th Cir. 1996). *See also United States v. Pickar*, 616 F.2d 821, 825 (2010) (same); *United States v. Kelley*, 412 F.3d 1240, 1241 (11th Cir. 2005) (same); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (same); *Higdon*, 832 F.3d at 315 (same). It is therefore "possible for a defendant to engage in intimidation without ever issuing a verbal threat by, for example, slamming a hand on a counter." *In re Smith*, 928 F.3d at 1293 (Jill Pryor, J., dissenting) (citations omitted).

No reason exists why this same definition of "intimidation" should not apply here. And, applying this definition of intimidation, carjacking can never qualify as a "crime of violence."

This conclusion is not altered by the fact that the carjacking statute requires that the defendant possess the intent to cause death or serious bodily harm because they are "use-of-force" clause and the intent to cause harm distinct statutory elements. Some courts which have found § 2119 to satisfy the "use-of-force" clause have done improperly merged the two elements. In *United States v. Jackson*, for example, the Sixth Circuit followed, without significant analysis, bank robbery precedents holding that "taking by intimidation under ... involves the threat to use physical force." 918 F.3d 467, 486 (6th Cir. 2019) (citations omitted). That court held that its conclusory syllogism was "supported by the fact that the carjacking statute

requires that the government prove the defendant committed the offense 'with the intent to cause death or serious bodily injury." *Id*. *See also United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018) (same), *cert. denied*, 139 S. Ct. 1391 (2019); *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017) ("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.'"), *cert. denied*, 138 S. Ct. 1602 (2018).

As Judge Pryor correctly observed, however, "a defendant could still be found guilty of carjacking 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 so long as the government could separately satisfy the intent element," which it could do, for example, by "looking . . . at his prior bad acts." *In re Smith*, 829 F.3d at 1284 (citation omitted). Thus, carjacking by intimidation does not necessarily require in every case that the defendant use, attempt to use, or threaten to use violent physical force, as required by *Johnson*. As a result, the statute is categorically overbroad and does not qualify as a crime of violence under § 924(c)'s elements clause.

C. Intimidation does not require an intentional threat.

An additional reason that carjacking does not satisfy the "use-of-force" clause is because intimidation does not require an intentional threat of violent physical force. The "use-of-force" clause in 18 U.S.C. § 924(c)(1)(A) requires an intentional *mens rea* with respect to the "use" of force. *See Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (the term "use" in §16(a)'s elements clause requires an "active employment" of force, which "most naturally" requires a high degree of intent"). Offenses that can be committed with a lesser *mens rea* are overbroad, and fall outside the elements clause. *See United States v. Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (a crime that need not be committed intentionally does not "have as an element the use of physical force;" citing and following *Leocal*).

Under § 2119, however, the defendant need not subjectively "intend to cause death or serious bodily harm," so long as "someone in the victim's position might reasonably [so] conclude." *See* Pattern Instr. 78. Saying "get out of the car" in a menacing voice would easily satisfy both the intimidation element, even though no force was overtly threatened, and the defendant did not intend to put the victim in fear of physical injury.

Federal cases interpreting the intimidation element in the federal bank robbery statute, 18 U.S.C. § 2113(a), are instructive here. As discussed above, federal bank robbery may be accomplished by "intimidation," which means placing someone in fear of bodily harm – the same action required under carjacking. Intimidation is satisfied under the bank robbery statute "whether or not the defendant actually

intended the intimidation," as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *Woodrop*, 86 F.3d at 364. *See also Yockel*, 320 F.3d at 821 (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon); *Kelley*, 412 F.3d at 1244 ("Whether a particular act constitutes intimidation is viewed objectively, . . . and a defendant can be convicted under [federal bank robbery] even if he did not intend for an act to be intimidating."). Whether the defendant intended to intimidate the victim is "irrelevant." *United States v. Pickar*, 616 F.2d 821, 825 (8th Cir. 2010) ("Intimidation is measured under an objective standard, and, therefore, whether the bank robber intended to intimidate the bank teller is irrelevant."); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) ("Whether Foppe specifically intended to intimidate Del Rosario is irrelevant.").

Hence, a defendant may be found guilty of the element of intimidation even though he did not intend to put another person in fear of injury. It is enough that the victim reasonably fears injury from the defendant's actions – whether or not the defendant actually intended to create that fear. Due to the lack of this intent, carjacking criminalizes conduct that does not require an intentional threat of physical force. It follows that carjacking also fails to qualify as a "crime of violence."

CONCLUSION

Based upon the foregoing, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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