NO.

IN THE SUPREME COURT OF THE UNITED STATES

ANDREA ZAMBRANO AND
ANTHONY CARTER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

JOINT PETITION FOR A WRIT OF CERTIORARI

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January 23, 2020

Questions Presented For Review

1. Whether *United States v. Davis*, 139 S. Ct. 2319 (2019), retroactively invalidates the residual clause of 18 U.S.C. § 924(c)(3)(B).

2. Whether "intimidation," as used in the federal carjacking statute, 18 U.S.C. § 2119, is not a crime of violence because a threat of mental or non-corporeal harm cannot satisfy the "use, attempted use, or threatened use of physical force" required by the elements clause of 18 U.S.C. § 924(c)(3)(A).

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Petition for Certiorari

Petitioners Andrea Zambrano and Anthony Carter jointly petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit. This joint petition is proper under Supreme Court Rule 12.4, as the Petitioners are co-defendants and each challenge orders from the same case and court, and raise the same issue—whether federal carjacking, 18 U.S.C. § 2119, is a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A). Petitioners asks this Court to grant certiorari, vacate the Ninth Circuit's denials of certificates of appealability, and remand for further proceedings.

Orders Below

The orders denying Petitioners' motion to vacate under 28 U.S.C. § 2255 in the U.S. District Court for the District of Nevada and the orders denying appellate relief in the Ninth Circuit Court of Appeals are attached in the Appendix:

- *United States v. Zambrano*, No. 2:13-cr-00437-LDG-VCF-1, 2019 WL 3578765 (D. Nev. June 21, 2019); *appeal denied*, No. 19-16461 (9th Cir. Oct. 25, 2019);

- *United States v. Carter*, No. 2:13-cr-00437-LDG-VCF-2, 2019 WL 2578764 (D. Nev. June 21, 2019), *appeal denied*, No. 19-16460 (9th Cir. Oct. 25, 2019).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final orders in Petitioners' cases on October 25, 2019. *See* Appendix. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per 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:

> For purposes of this subsection, the term "crime ofviolence" 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.

Title 18 of the United States Code, Section 2119, entitled "motor vehicles" criminalizes the following offense:

> 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,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

Title 18 of the United States Code, Section 1365(h)(3) and (4), define "serious bodily injury" and "bodily injury" as follows:

As used in this section--

(3) the term "serious bodily injury" means bodily injury which involves--

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(4) the term "bodily injury" means--

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary.

Reasons for Granting the Writ

Petitioners Zambrano and Carter are each serving 126-month prison sentences, which each include seven-year mandatory, consecutive prison sentences for an unconstitutional § 924(c) conviction. Two grounds support a grant of certiorari. Petitioners Zambrano and Carter jointly request certiorari on both grounds to reconcile and bring accord among the federal circuits:

1. Whether *United States v. Davis*, 139 S. Ct. 2319 (2019), retroactively voided as unconstitutional the residual clause of 18 U.S.C. § 924(c)(3)(B); and

2. Whether "intimidation," as used in the federal carjacking statute, 18 U.S.C. § 2119, is not a crime of violence because a threat of mental or non-corporeal harm cannot satisfy the "use, attempted use, or threatened use of physical force" required by the elements clause of 18 U.S.C. § 924(c)(3)(A).

This Court has long attempted to unify the "crime of violence" definition in federal criminal statutes. On June 24, 2019, this Court settled the matter as to 18 U.S.C. § 924(c). In *Davis*, this Court held the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague under the Due Process Clause. While the decision does not address retroactivity, the Solicitor General conceded *Davis*'s ruling would apply retroactively. Thus, remand is necessary as the Petitioners' challenges to their respective 18 U.S.C. §924(c) convictions were both timely filed and meritorious.

It may seem counter-intuitive that carjacking does not meet the "physical force" requirement of § 924(c)(3)(A)'s elements clause. This result stems from the tension between legislative intent to include a broad range of conduct as possible in criminal statutes, while limiting the harsh penalties of § 924(c) to those offenses

truly violent. Circuit courts, including at least the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits, continue to erroneously hold that carjacking committed by intimidation—which requires no use of force or threatened use of force of physical injury—qualifies as a crime of violence under § 924(c)'s elements clause. These circuit courts interpret carjacking by "intimidation" to require "fear of bodily harm."

Yet the carjacking statute defines "bodily" injury to include the "impairment of the function" of a "mental faculty." 18 U.S.C. § 1365 (as incorporated by reference in 18 U.S.C. § 2119). Carjacking by intimidation occurs when there is fear of mental or non-corporeal injury, and does not require fear or threat of physical injury. This Court excludes mental or "emotional" harm from § 924(c)(3)(A)'s force requirement, limiting qualifying offenses to those that require "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Carjacking is not categorically a crime of violence.

This case presents a question of exceptional importance for defendants facing mandatory consecutive sentences under 18 U.S.C. § 924(c). The Ninth Circuit joins several other circuits in ignoring the statutory elements of carjacking to create a necessarily violent crime where there is none. Certiorari is necessary to ensure all circuits appropriately exclude 18 U.S.C. § 2119 offenses from 18 U.S.C. § 924(c).

Related Cases Pending in this Court

Petitioners are not aware of any related cases pending in this Court.

Statement of the Cases

Petitioners are serving a combined 21 years in federal prison, 14 years of which are unconstitutional. The Petitioners' federal carjacking convictions are not crimes of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause. No use, attempted use, or threatened use of violent physical force was required for conviction. The conviction can only be argued to qualify as a predicate crime of violence under § 924(c)'s now-void residual clause. Petitioners request certiorari to correct the Ninth Circuit's deviation from established federal law on the requirements for § 924(c)'s elements clause.

A. Mandatory, consecutive 7-year sentences for use of a firearm during a carjacking.

Petitioners Zambrano and Carter each pled guilty to one count of federal carjacking under 18 U.S.C. § 2119, and one count of using a firearm during and in relation to a crime of violence, specifically carjacking, under 18 U.S.C. § 924(c). Ms. Zambrano and Mr. Carter each received a 42-month prison term on the carjacking count, and an 84-month (7-year) mandatory consecutive sentence on the § 924(c) count. ECF 45, 56, 60, 67. Under their plea agreements, neither Ms. Zambrano nor Mr. Carter filed a direct appeal.

B. Relied denied, despite this Court's holdings in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *United States v. Davis*, 139 S. Ct. 2319 (2019).

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 held that *Johnson* announced a new substantive rule retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

Both Petitioners, represented by the Federal Public Defender for the District of Nevada, filed timely motions to vacate under 28 U.S.C. § 2255, given *Johnson*, which the government opposed. ECF 70, 73, 75, 76, 79, 80, 81, 82. The motions to vacate argued that: § 924(c)(3)(B)'s residual clause is void for vagueness; and federal carjacking is not a crime of violence under the remaining elements clause at 18 U.S.C. § 924(c)(3)(A).

On June 24, 2019, this Court held the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally void for vagueness. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). The *Davis* opinion issued the same day as the district court's judgments denying both Petitioners' § 2255 motions.

Without holding a hearing, the district court issued orders on June 21, 2019, and judgments on June 24, 2019, denying both Petitioners' motions to vacate and denying certificates of appealability (COA). *See* Appendix (ECF 99, 100, 101, 102). The district court rested its denials on *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1602 (2018), which erroneously found carjacking at 18 U.S.C. § 2119 satisfied the elements clause of 18 U.S.C. § 924(c)(3)(A). ECF No. 99, pp.2-3; ECF 100, pp.2-3. The district court denied certificates of appealability (COA). ECF No. 99, p.3; ECF 100, p.3. Petitioners

timely requested a COAs from the Ninth Circuit, which the Ninth Circuit denied without discussion on October 25, 2019. *See* Appendix.

The Petitioners remain in federal custody serving their respective unconstitutional sentences. Ms, Zambrano's estimated release date is April 29, 2013, and Mr. Carter's estimated release date is March 14, 2023. Both Petitioners are therefore eligible for immediate release should their respective § 924(c) sentences be vacated.

Argument

I. Certiorari is necessary to resolve whether *United States v. Davis*, 139 S. Ct. 2319 (2019), retroactively invalidated the residual clause at 18 U.S.C. § 924(c)(3)(B).

Section 924(c) provides for 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 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. § 924(c)(3). The first clause, § 924(c)(3)(A), is referred to as the elements clause. The second clause, § 924(c)(3)(B), is referred to as the residual clause.

In *Johnson*, this Court struck the ACCA's residual clause, at 18 U.S.C. § 924(e), as unconstitutionally vague. 135 S. Ct. at 2557. The ACCA contains

similar element and residual clauses to 18 U.S.C. § 924(c). The ACCA defines "violent felony" as:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (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).

This Court also held *Johnson* retroactively applies to all defendants sentenced under the ACCA. *Welch*, 136 S. Ct. at 1265. Because striking § 924(e)'s residual clause as void for vagueness "alter[ed] the range of conduct or the class of persons that the law punishes," *Johnson* announced a substantive rule retroactively applicable to petitioners on collateral review. *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

In *Davis*—issued the same day at the district court's denial of § 2255 relief in Petitioners' cases—this Court struck § 924(c)(3)(B) as unconstitutionally vague. 139 S. Ct. at 2336. The government conceded in its *Davis* briefing that a rule holding § 924(c)'s residual clause void for vagueness would be retroactive. *United States v. Davis*, No. 18-431, Brief for the United States, p. 52 (U.S. Feb. 12, 2019) ("A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive

substantive rule applicable on collateral review."). Like this Court's decision in *Johnson*, which "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied," *Welch*, 136 S. Ct. at 1265, *Davis*'s holding limits the range of conduct or class of persons that the law punishes under § 924(c). *Davis* is likewise retroactively applicable to all defendants sentenced under § 924(c)(3)(B).

There are over 50 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—which seek 28 U.S.C. § 2255 relief from § 924(c) convictions and sentences under *Johnson*. Because this Court recently invalidated the § 924(c) residual clause in *Davis*, Petitioners jointly request this Court grant certiorari on the closely aligned issue of whether *Davis*'s decision applies retroactively.

II. Certiorari is necessary to resolve whether carjacking, 18 U.S.C. § 2119, qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

With *Davis* retroactively invalidating § 924(c)(3)(B)'s residual clause, carjacking under 18 U.S.C. § 2119 may only qualify as a crime of violence if it satisfies the elements clause in § 924(c)(3)(A). The elements clause, also known as the force clause, defines a crime of violence as a felony that "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). Carjacking does not meet this definition.

A. The categorical approach applies.

To meet the elements clause, the offense must have "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). This means the underlying statute must require two elements: (1) violent physical force capable of causing physical pain or injury to another person, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) the use of force must be intentional and not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This case presents a question under the first requirement, as carjacking lacks the requisite level of force.

The *Davis* decision cemented the long-standing rule that to determine if an offense qualifies as a "crime of violence" under § 924(c), courts use the categorical approach. *Davis*, 139 S. Ct. at 2326-36. In applying the categorical approach, courts examine only the statutory definition of the underlying offense, not the underlying facts. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). How a defendant committed the offense "makes no difference." *Id.* at 2251. The categorical approach requires courts to "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Id.* at 2248. If the statute of conviction criminalizes some conduct that does involve intentional violent force and some conduct that does not, the statute of conviction is overbroad and does not categorically constitute a crime of violence. *Id.*

In Petitioners' cases, the focus falls on the term "physical force" as required by this Court. *Stokeling*, 139 S. Ct. at 554 (citing *Johnson*, 559 U.S. at 140). This

Court does not include mental injury, non-corporeal injury, or the threat thereof in its definition of "physical force." Instead, this Court requires "physical force" to be "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. This Court clarified that "[t]he adjective 'physical' is clear in meaning . . . distinguishing physical force from, for example, intellectual force or emotional force." *Id.* at 138. Carjacking does not meet this definition.

B. Carjacking by "intimidation" does not require the use or threatened use of physical harm, and may instead involve threats of non-corporeal harm.

Carjacking can be committed "by force and violence or by intimidation." 18 U.S.C. § 2119. Applying the categorical approach, the least egregious conduct the statute covers is intimidation.

The First, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits define carjacking by "intimidation" to require "conduct that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Gutierrez*, 876 F.3d 1254, 1255-57 (9th Cir. 2017) (per curiam), *cert. denied*, 138 S. Ct. 1602 (2018); *see also Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2018) *cert. denied*, -- S. Ct.--, 2019 WL 5875233 (2019); *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019); *United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1391 (2019); *Ovalles v. United States*, 905 F.3d 1300, 1304 (11th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 2716 (2019); *United States v. Jones*, 854 F.3d 737, 740 (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. Kundo*, 743 F. App'x 201, 203 (10th Cir. 2018).

Specifically, the Ninth Circuit's carjacking by "intimidation" holding focuses on "bodily" harm:

> 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."

Gutierrez, 876 F.3d at 1257 (quoting 18 U.S.C. § 2119). But the circuit holdings finding carjacking by "intimidation" necessarily involves threat of physical injury ignore that the specific definition of "bodily" harm in the carjacking statute includes mental and non-corporeal harm.

The carjacking statute, cross-references 18 U.S.C. § 1365, to define "bodily injury" as "serious bodily injury (as defined in section 1365 of this title . . .)." In turn, § 1365's definition includes not only traditional physical corporal harm, but also non-corporeal harm. Specifically, "bodily injury" includes "the impairment of the function of a . . . mental faculty," 18 U.S.C. § 1365(h)(4), and "serious bodily injury" includes "bodily injury which involves . . . protracted loss or impairment of the function of a . . . mental faculty," 18 U.S.C. § 1365(h)(3). Therefore, a threat of mental, emotional, or psychological harm will put the defendant in fear of "bodily harm." This non-corporeal definition of "bodily harm" is not addressed by the Circuit decisions.

This Court's interpretation of the carjacking statute follows this broad reading of "intimidation." As this Court explained in *Holloway v. United States*, 526 U.S. 1 (1999), addressing the intent necessary for carjacking, 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. Carjacking by intimidation is satisfied by "an empty threat, or intimidating bluff." *Id.* While to obtain a § 2119 conviction the government must "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," this Court does not require the threat of such harm to obtain a carjacking conviction. *Id.* As this Court recognizes, 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").

Yet to qualify under § 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) (finding Massachusetts armed robbery statute does not qualify as a violent felony under the ACCA). The government argued in *Parnell* that anyone who commits robbery harbors an "uncommunicated willingness or readiness" to use violent force sufficient for crime of violence purposes. *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.* Accordingly, the Ninth Circuit found Massachusetts armed robbery statute did not qualify as a violent felony. *Id.* Like the statute in *Parnell*, carjacking by intimidation has no requirement of an outward threat of physical harm and fails to qualify as a crime of violence.

Textual statutory analysis also supports the broad definition of carjacking by "intimidation" including non-corporeal harm. First, in 18 U.S.C. § 2119, Congress specifically cross-referenced to § 1365 in the carjacking, as it does in other—but not all—criminal statutes referring to "bodily injury." *See, e.g.,* 18 U.S.C. § 113(b)(2) (assaults within maritime and territorial jurisdiction); 18 U.S.C. § 115(b)(1)(B)(iv) (influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member); 18 U.S.C. § 1347(a) (health care fraud). This cross-reference to include a specific definition of "bodily injury" shows a deliberate choice to give "bodily" a broad definition here.

Congress has demonstrated its ability to limit "bodily" to purely physical harm, either by not cross-referencing § 1365, or by specifically removing the mental-injury component. For example, the hate crime statute, at 18 U.S.C. § 249(c)(1), limits "bodily injury" to corporeal harm: "the term 'bodily injury' has the meaning given such term in section 1365(h)(4) of this title, but does not include *solely emotional or psychological* harm to the victim." 18 U.S.C. § 249(c)(1) (emphasis added). According to long-standing canons of statutory construction, where a

statute specifically incorporates the § 1365 "bodily injury" definition without limitation, then § 1365's inclusion of non-corporeal harm must count as "bodily" injury.

In addition, carjacking by "intimidation" can be committed by threats to inflict legal or reputational harm. For example, a defendant pretending to be an armed uniformed police officer when seizing a car from the victim, or a defendant towing a victim's car while claiming authority to do so and while possessing a firearm. In both examples, a victim turns over the vehicle out of fear of the legal and economic implications of resisting, even though there has been no threat – explicit or implicit – to inflict physical harm. The fear of legal consequences intimidates.

Caselaw documents this police-impersonation carjacking scenario. *See, e.g., United States v. Martinez*, 862 F.3d 223, 230, 240-41 (2d Cir. 2017) ("One of the coconspirators' main stratagems was to impersonate officers of the New York City Police Department."); *United States v. Green,* 664 Fed. App'x 193, 195 (3d Cir. 2016) ("Green and an unidentified accomplice carried out an armed carjacking while impersonating police officers."); *United States v. Vizcarrondo-Casanova*, 763 F.3d 89, 93 (1st Cir. 2014) (discussing prior bad acts evidence, including instances where co-defendants impersonated police or federal agents to commit robberies and carjackings); *United States v. Diaz*, 248 F.3d 1065, 1097 (11th Cir. 2001) ("appellants impersonated police by driving a white Chevrolet Caprice and using a blue flashing light to pull Armando Gonzalez over"); *Khneiser v. Fisher*, No. 5:16-cv-

00936, 2017 WL 3394323 (C.D. Cal. Aug. 7, 2017) (affirming denial of § 2254 challenge where defendant impersonated police officer to commit armed robbery and carjacking); *Jones v. Prelesnik*, 2:08-cv-14126, 2011 WL 1429206, *1 (E.D. Mich. Apr. 14, 2011) (same). Although the defendants in these cases did, in fact, ultimately use physical force to carry out the carjackings, these citations show that carjacking by impersonation would not require such force or threats of force. Intimidation in this manner – not involving force or threatened force – is, thus, "more than the application of legal imagination." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

A review of "intimidation" decisions among the Fourth, Fifth, Ninth, and Eleventh Circuits, show these courts broadly interpret "intimidation" for sufficiency —to sweep the widest possible range of conduct into robbery. These courts affirm robbery convictions including non-violent conduct that *does not* involve the use, attempted use, or threats of violent force:

- 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, taking $961.00. *United States v. Kelley*, 412 F.3d 1240, 1243 (11th Cir. 2005). The men did not speak during the robbery. *Id.*

- 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). The teller said she had no hundreds or fifties, and 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.*

Despite this broad definition of "intimidation," these circuits then find "intimidation" must, as a matter of law, involve the use, attempted use, or threats of violent physical force for § 924(c) analysis. *See Gutierrez*, 876 F.3d at 1255-57; *Estell,* 924 F.3d at 1293; *Jackson*, 918 F.3d at 486; *Cruz-Rivera*, 904 F.3d at 66; *Ovalles,* 905 F.3d at 1304; *Jones*, 854 F.3d at 740; *Evans*, 848 F.3d at 246-48; and *Kundo*, 743 F. App'x at 203. The conflicting interpretation of "intimidation"—a non-violent one for sufficiency analysis and a violent one for crime-of-violence analysis—cannot stand.

This Court, in *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*, 559 U.S. at 140) (emphasis added). While the conduct in the above examples were no doubt be emotionally or intellectually disturbing to the victims, the offenses involved no physical force or threat of physical force. Non-violent robbery by intimidation does not qualify under *Stokeling*.

This Court requires § 924(c) crimes of violence to involve "force, or threatened force, capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Because federal carjacking permits intimidating conduct threatening non-corporeal harm, it cannot qualify as a crime of violence after *Davis*. The Ninth Circuit's denial of relief for Petitioners Zambrano and Carter is at odds with both this Court's and Supreme Court precedent.

C. The carjacking statute, 18 U.S.C. § 2119 is indivisible, and categorically does not qualify as a 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 a criminal statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,'" the statute is divisible. *Descamps v. United States*, 570 U.S. 254, 263-64 (2013). 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.

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, e.g., 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 18 U.S.C. § 2119 is indivisible, analysis is limited to the categorical approach and the federal carjacking statute is not a crime of violence under § 924(c)(3)(A)'s elements clause.

Conclusion

Petitioners respectfully suggest this Court grant the petition, vacate the denial of certificates of appealability, and remand for reconsideration, given *Davis*. In the alternative, this Court should grant plenary review to hold that federal carjacking, by defining "intimidation" to include threats of non-corporeal harm, is not categorically a crime of violence under 18 U.S.C. § 924(c).

Respectfully submitted,
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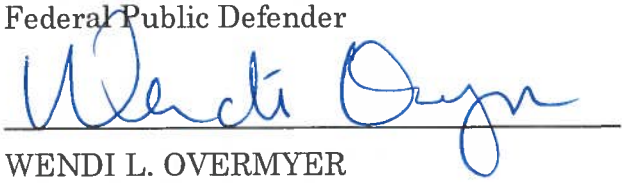

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