Case No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

FRANK HARPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. A. Should certiorari be granted to determine whether Harper was denied the effective assistance of counsel for the failure to challenge on appeal and via a petition for certiorari the district court's refusal to consider the statutorily mandated consecutive sentences for Harper's 18 U.S.C. §924(c) convictions when fashioning the sentences for his predicate offense convictions in light of his similarly situated co-defendants obtaining relief after raising the same issue on appeal and in the Supreme Court due to the foreshadowing of this Court's decision in Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017)?

B. Should certiorari be granted to determine whether Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017), announced a new rule of rule retroactively applicable on collateral review?

II. Should certiorari be granted to address whether a conviction for carjacking by "intimidation" qualifies as a predicate offense under the "force" or "elements" clause of 18 U.S.C. §924(c)(3)(A)?

LIST OF RELATED PROCEEDINGS

- United States v. Frank Harper, United States District Court for the Eastern District of Michigan, Case No. 11-cr-20188, Amended Judgment entered November 7, 2014
- United States v. Frank Harper, United States Court of Appeals for the Sixth Circuit, Case No. 14-2427, Judgment entered March 3, 2016, United States v. Edmond, 815 F.3d 1032 (6th Cir. 2016)
- Frank Harper v. United States, United States Supreme Court Case No. 16-160, Petition for Certiorari denied January 9, 2017
- Frank Harper v. United States, United States District Court for the Eastern District of Michigan, Case No. 11-cr-20188, Judgment entered February 8, 2018
- Frank Harper v. United States, United States Court of Appeals for the Sixth Circuit, Case No. 18-1202, Judgment entered November 26, 2019
- Phillip Harper v. United States, United States Supreme Court Case No. 16-5461, Petition for Certiorari granted, vacated and remanded April 17, 2017, Judgment entered May 19, 2017
- Bernard Edmond v. United States, United States Supreme Court Case No. 16-5441, Petition for Certiorari granted, vacated and remanded April 17, 2017, Judgment entered May 19, 2017
- United States v. Phillip Harper, United States District Court for the Eastern District of Michigan, Case No. 11-cr-20188, Amended Judgment entered May

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- United States v. Bernard Edmond, United States District Court for the Eastern District of Michigan, Case No. 11-cr-20188, Amended Judgment entered May 9, 2018

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OPINION BELOW

The Opinion by the United States Court of Appeals for the Sixth Circuit is Frank Harper v. United States, U.S. Court of Appeals for the Sixth Circuit No. 18-1202, R. 46-2; 2019 WL 6321329 (6th Cir. 2019). The Opinion is attached as the Appendix hereto.

JURISDICTIONAL STATEMENT

Harper's Motion under 28 U.S.C. §2255 was denied by the United States District Court for the Eastern District of Michigan. A certificate of appealability was also denied by the district court.

After filing a Notice of Appeal in the United States Court of Appeals for the Sixth Circuit, Harper filed a Motion for Certificate of Appealability, which was granted as to two claims raised by him.

On November 26, 2019, the United States Court of Appeals for the Sixth Circuit denied relief and affirmed the district court's judgment.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review the court of appeals' decision on petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Const. Amend. V:

> No person shall be ... deprived of life, liberty, or property, without due process of law...

Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §924(c), in pertinent part, states the following:

> (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—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> * * *
>
> (C) In the case of a second or subsequent conviction under this subsection, the person shall—
>
> (i) be sentenced to a term of imprisonment of not less than 25 years; and
> (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.
>
> * * *
>
> (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, in pertinent part, states the following:

> 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...

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner Frank Harper was convicted of conspiracy under 18 U.S.C. §371, three counts of carjacking under 18 U.S.C. §2119 and three counts of using and carrying a firearm during and in relation to a crime of violence under 18 U.S.C. §924(c). He was sentenced to a total of seven hundred fifty seven (757) months, or just over sixty three (63) years of imprisonment. (Judgment, R. 211, Page ID#3729-3730; Am. Judgment, R. 221, Page ID#3750-3755). After his appeal was consolidated with his two trial co-defendants, his convictions were affirmed by the United States Court of Appeals for the Sixth Circuit. United States v. Edmond, 815 F.3d 1032 (6th Cir. 2016); Opinion, 6th Cir. No. 14-2427, R. 51-2, pp. 1-17. He then filed a petition for a writ of certiorari in the United States Supreme Court, which was denied. Frank Harper v. United States, Supreme Court No. 16-160.

Subsequently, Harper's motion under 28 U.S.C. §2255 was denied by the district court, and he appealed. Upon motion in the court of appeals, a Certificate of Appealability ("COA") was granted on two of Harper's claims. (Order, 6th Cir. No.

18-1202, R. 10-2, p.10). After briefing and oral argument, the Sixth Circuit denied relief. Frank Harper v. United States, U.S. Court of Appeals for the Sixth Circuit No. 18-1202, R. 46-2 (attached at Appendix).

Frank Harper's Sentencing

During Harper's sentencing on October 27, 2014, his trial counsel asked the district court to impose a sentence of 55 years imprisonment based only on the statutory sentencing mandate for three counts of using and carrying a firearm during and in relation to a crime of violence under 18 U.S.C. §924(c)(1)(A). Counsel argued that such a sentence would satisfy both the statutory mandate and the consecutive sentencing provisions of §924(c) as well as the sentencing guidelines. (Sent. Hrg., R. 234, Page ID#4088). But, the district court denied the request, expressing the belief that the law required separate consideration. (Id., Page ID#4102-4103).

The district court then sentenced Harper to terms of confinement of 60 months and 97 months on the conspiracy and substantive carjacking convictions, to be served concurrently with each other, to be followed by the statutorily mandated term of 55 years on the three §924(c) convictions, to be served consecutively to the conspiracy and substantive counts. (Id., Page ID#4106). Harper's counsel objected to the imposition of any term of confinement beyond the mandatory 55 years of imprisonment. (Id., Page ID#4107).

First Appeal

Harper's objection (and supporting argument) at the sentencing hearing that

55 years of imprisonment was enough was not raised by his appellate counsel in his first Sixth Circuit appeal. However, Harper's two trial co-defendants, his brother Phillip Harper ("Phillip") and Bernard Edmond ("Edmond"), each raised this argument in the consolidated appeal of the three co-defendants. The Sixth Circuit denied this argument, relying on United States v. Franklin, 499 F.3d 578 (6th Cir. 2007), which had held, "'[t]he sentencing court must determine an appropriate sentence for the underlying crimes without consideration of the § 924(c) sentence.'" United States v. Edmond, 815 F.3d 1032, 1048 (6th Cir. 2016). The court of appeals also denied relief on all the other arguments made by any of the three co-defendants. Edmond, supra.

Frank Harper, Phillip and Edmond each filed petitions for a writ of certiorari in the Supreme Court. While these three petitions were pending, Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017), was granted certiorari on October 28, 2016. Harper's petition, which did not raise a challenge to the district court's discretion as it pertained to the non-§924(c) sentences, was denied on January 9, 2017. (Frank Harper v. United States, Supreme Court No. 16-160). Phillip's and Edmond's petitions, which did challenge the district court's sentencing discretion, were not decided by the Supreme Court until after Dean was issued. After Dean was decided on April 3, 2017, both Phillip and Edmond were granted relief via a grant, vacate and remand ("GVR"), with the court of appeals then sending their cases back to the district court for resentencing based on the holding in Dean. (Order, 6th Cir. No. 14-2428, R. 58-2, p. 1; Order, 6th Cir. No. 14-2426, R. 54-2, p. 1).

On resentencing, the district court reduced both Phillip's and Edmond's non-§924(c) sentences to concurrent sentences of 1 day. This amounted to a reduction from 151 months to 1 day for Phillip and from 240 months to 1 day for Edmond. (Resent Hrg., R. 316, Page ID#4725-4728).

Frank Harper's Motion under 28 U.S.C. §2255 and Second Appeal

After his petition for writ of certiorari was denied, Harper filed a pro se "Memorandum in Support of Motion for Relief in Light of Johnson, 135 S.Ct. 2551 (2015)". (Pro Se Motion, R. 256, Page ID#4342-4352). Subsequently, the district court treated this document as a motion under 28 U.S.C. §2255 (with the government agreeing) and then appointed counsel for Harper under the Criminal Justice Act. (Order Appoint. Counsel, R. 277, Page ID#4390). Counsel amended the motion, retaining the claim from the initial pro se filing and adding four additional claims. (Am. 2255 Motion, R. 282, Page ID#4409-4435). After the district court's denial of the §2255 motion and a COA, Harper appealed. The Sixth Circuit granted a COA on two of the claims, "Ground One" and "Ground Two" of Harper's §2255 motion, which were as follows:

> "(1) pursuant to Johnson, carjacking is not a crime of violence and therefore cannot serve as a predicate felony for Harper's § 924(c) convictions; and (2) appellate counsel was ineffective for failing to challenge on appeal the district court's failure to consider the § 924(c) mandatory minimum sentences when determining the sentences for the predicate convictions and that, alternatively, he is entitled to resentencing because Dean is retroactively applicable to cases on collateral review." (Order, 6th Cir. No. 18-1202, R. 10-2, p. 4-10).

These claims were denied and the court of appeals affirmed the district court's

judgment. (Attached at Appendix). This petition for a writ of certiorari follows.

REASONS FOR ALLOWANCE OF THE WRIT

This case is of great of importance to petitioner Frank Harper because it affords the Supreme Court the opportunity to rectify the injustice sustained by this defendant who was denied the significant relief granted to his similarly situated co-defendants due to his counsel's ineffectiveness. At the same time, more broadly, in answering the question presented, the Court would clarify the judicial process and ensure systematic fairness in like circumstances.

The decisions below have resulted in a fundamentally unfair interpretation of the applicability and extent of the constitutional right to counsel. While it is established that a criminal defendant does not have the right to counsel to submit a petition for a writ of certiorari in the Supreme Court, when defense counsel is actively representing a criminal defendant and he or she does file a petition for certiorari and continues to litigate on behalf of his/her client, the Sixth Amendment – as well as the Fifth Amendment right to due process of law – requires that counsel render effective assistance throughout the proceedings.

In addition, Harper contends that Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017), announced a new rule of law that should be made retroactively applicable on collateral review. While the Sixth Circuit and at least one other circuit court have held that Dean does not so apply, it does not appear that this Court has addressed the issue.

Also, Harper contends that since the carjacking statute, 18 U.S.C. §2119,

allows for convictions by "intimidation" only, without any actual injury, it does not qualify as a predicate under the "force clause" in 18 U.S.C. §924(c)(3)(A). While the Sixth Circuit and other circuit courts have held that intimidation alone satisfies the force clause, it does not appear that this Court has addressed this issue. And, whether "intimidation" only can satisfy the §924(c)(3)(A) force clause reaches beyond just the carjacking statute to include another oft-litigated statute, bank robbery under 18 U.S.C. §2113(a). Granting certiorari is requested to resolve whether these offenses, which allow for conviction by intimidation only, qualify as §924(c) predicates.

All of these questions warrant granting certiorari under Supreme Court Rule 10(c) because "a United States court of appeals has decided ... important question[s] of federal law that ha[ve] not been, but should be, settled by this Court..."

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER

(A) HARPER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO CHALLENGE ON APPEAL AND VIA A PETITION FOR CERTIORARI THE DISTRICT COURT'S REFUSAL TO CONSIDER THE STATUTORILY MANDATED CONSECUTIVE SENTENCES FOR HARPER'S 18 U.S.C. §924(c) CONVICTIONS WHEN FASHIONING THE SENTENCES FOR HIS PREDICATE OFFENSE CONVICTIONS IN LIGHT OF HIS SIMILARLY SITUATED CO-DEFENDANTS OBTAINING RELIEF AFTER RAISING THE SAME ISSUE ON APPEAL AND IN THE SUPREME COURT DUE TO THE FORESHADOWING OF THIS COURT'S DECISION IN DEAN V. UNITED STATES, 581 U.S. __, 137 S.CT. 1170 (2017), AND/OR

(B) DEAN V. UNITED STATES, 581 U.S. __, 137 S.CT. 1170 (2017), ANNOUNCED A NEW RULE OF RULE RETROACTIVELY APPLICABLE ON COLLATERAL REVIEW.

The unique facts and circumstances of this case show that Harper was denied

the due process of law and the effective assistance of counsel for failure to raise on appeal a sentencing issue argued in the district court and the failure to preserve / include this issue in the petition for a writ of certiorari filed by his counsel on his behalf in the Supreme Court – this was the same sentencing issue raised by Harper's two similarly situated co-defendants in the district court, court of appeals, and Supreme Court, which ultimately resulted in relief being granted to them.

At sentencing, Harper's counsel asked the district court – when determining the sentences for the predicate crimes – to impose a sentence of 55 years, which would be based on the statutorily mandated terms of imprisonment and the consecutive sentencing provisions of §924(c), and he argued that such a sentence would satisfy the sentencing guidelines. (Sent. Hrg., R. 234, Page ID#4088). The district court declined this request, believing it was required to calculate the sentence based on the separate consideration of Harper's other convictions for the predicate offenses of carjacking and the conspiracy offense.

The district court went on to sentence Harper to concurrent terms of confinement of 60 months and 97 months (or 8 years and 1 month) on the conspiracy and carjacking convictions to be followed by 55 years on the §924(c) convictions. (Id., Page ID#4106). Harper's trial counsel objected to the imposition of any term of confinement beyond the mandatory 55 years. (Id., Page ID#4107). However, this defense objection (and supporting argument) was not raised by Harper's appellate counsel in his direct appeal to the court of appeals nor in his petition for a writ of certiorari which he filed and pursued in the Supreme Court.

Harper's similarly situated co-defendants, Phillip and Edmond, both of whom also had multiple convictions under this statute (18 U.S.C. §924(c))as a result of the same, joint trial, made the same request as Harper at sentencing and were denied, but they both raised and argued the issue in their direct appeals to the Sixth Circuit. United States v. Edmond, 815 F.3d 1032, 1048 (6th Cir. 2016). Subsequently, they filed petitions for a writ of certiorari in the Supreme Court, and while they were pending, certiorari was granted in Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017), to address the precise issue: whether a district court can consider the mandatory consecutive nature of the §924(c) convictions at sentencing when considering the sentence for the predicate crimes of violence or drug crimes that the firearms were used "during and in relation to" or possessed "in furtherance of".

In Dean v. United States, supra, this Court held that a sentencing court can consider the mandatory consecutive nature of a sentence imposed for convictions under 18 U.S.C. §924(c) in determining the sentence for the underlying predicate crimes. Subsequently, Harper's two co-defendants were granted GVR relief. After their cases were remanded from the court of appeals to the district court, their non-§924(c) sentences were reduced from 151 months to 1 day (for Phillip) and from 240 months to 1 day (for Edmond).

In summary, in the instant case, the principle espoused by Dean was raised and argued in the district court by Harper's trial counsel but not raised or argued by his appellate counsel on direct appeal or in his petition for a writ of certiorari,

but his similarly situated co-defendants did so and eventually received a remand for resentencing, which resulted in substantially reduced sentences. Consequently, Harper's appellate counsel performed deficiently, both in the court of appeals and the Supreme Court, and Harper was severely and unfairly prejudiced as a result.

A.
Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 688, 104 S.Ct. 2052 (1984). This Court has long held that there is a right to counsel in the direct appeal. Douglas v. California, 372 U.S. 353 (1963). In addition, a defendant's right to effective assistance extends to appellate counsel in that direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985). While there is no right to counsel at the discretionary appeal phase under this Court's ruling in Ross v. Moffit, 417 U.S. 600 (1974), nonetheless, "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, fn.14, 90 S.Ct. 1441 (1970).

Petitioners in collateral proceedings under 28 U.S.C. §2255 have typically challenged as ineffective the failure to file a petition for a writ of certiorari on their behalf, in contravention of Ross. See, e.g., Nichols v. United States, 563 F.3d 240 (6th Cir. 2009); Wyatt v. United States, 574 F. 3d 455 (7th Cir. 2009). But, what about those defendants like Harper who have counsel who have filed a petition for a

writ of certiorari, but performed deficiently in doing so, resulting in prejudice to petitioner?

In the instant case, failure to raise this issue / argument was deficient performance by counsel and thus ineffective assistance because it was both objectively unreasonable and clearly prejudicial to Harper, especially in light of both of his similarly situated codefendants receiving direct appellate relief on this very same issue / argument and ultimately very substantial sentence reductions. And, unlike many of those who have challenged the failure to file a petition for a writ of certiorari as ineffective, Harper had counsel in this Court, who filed such a petition but in doing so performed deficiently to Harper's severe prejudice.

Prejudice

An important aspect of this case is that the prejudice to Harper is clear and significant, not speculative as in most cases asserting ineffectiveness of counsel. In sentencing co-defendants Phillip and Edmond, the district court said its discretion under Dean was the reason that it imposed a different sentence on remand. When the district court reduced the similarly situated co-defendants' non-§924(c) sentences to concurrent sentences of 1 day each (reduced from 151 months for Phillip and from 240 months for Edmond), this plainly showed the prejudice to Harper. Since his non-mandatory sentence (97 months or approximately 2,920 days) was less than the original sentence of both of his co-defendants, he no doubt would have received the same sentence reduction to 1 day had he been

resentenced[1].

At the resentencings of Phillip and Edmond (both similarly situated co-defendants to Harper), they were sentenced to the minimum sentence each could have obtained in light of the mandatory sentencing under §924(c), i.e., one (1) day of imprisonment on the non-§924(c) offenses. These reductions clearly show the prejudice to Harper, their co-defendant who had gone to trial with them, but was not re-sentenced and did not receive such a substantial reduction because his lawyer "dropped" the relevant issue during the appellate process.

Deficient Performance

Since there is a right to effective assistance of appellate counsel on a first appeal as of right, Evitts v. Lucey, supra, the initial ineffectiveness argued here is the failure of Harper's counsel to raise the issue on direct appeal in the Sixth Circuit after arguing it at sentencing in the district court, when the attorneys for the similarly situated Edmond and Phillip did so. Later, both co-defendants' counsel raised this issue at the certiorari stage in the Supreme Court, and were both successful in obtaining GVR relief, as well as ultimately successful at resentencing. Had Harper's counsel done the same, his client would have obtained the same relief; therefore, counsel's failure at the court of appeals constitutes his initial ineffective assistance.

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[1] Frank Harper's Motion to Take Judicial Notice of the resentencing proceedings for Phillip Harper and Bernard Edmond was granted by the Sixth Circuit, such that evidence of the prejudice to Harper is a part of this record. (Motion, 6th Cir. No. 18-1202, R. 25; Order, R. 38-2).

Harper's counsel did file a petition for a writ of certiorari in the Supreme Court on August 2, 2016. Certiorari was granted in Dean on October 28, 2016. The Solicitor General did not file a brief in opposition to Harper until December 2, 2016. Harper then replied on December 20, 2016. His petition was not denied until January 9, 2017. (See docket in Frank Harper v. United States, Supreme Court No. 16-160). In summary, the grant of certiorari in Dean was issued approximately 2 ½ months before Harper's petition was denied, and counsel for Harper could have (and should have) amended it during this time to include the pertinent issue. Failure to do so was the second instance of ineffective assistance of counsel.

Petitioning for a writ of certiorari based on an issue not previously raised below is not a barrier to relief. Harper's appellate counsel still had the ability to raise this issue by amendment to his petition via motion under Supreme Court Rule 21 or supplement to his briefing under Supreme Court Rule 15.8. He did not do so, even though certiorari was granted in Dean (forseshadowing a change in the law) about 2 ½ months before the Harper petition was denied and his conviction became final[2]. Counsel had more than ample opportunity to include this argument in his

[2] It is well recognized that a petition for a writ of certiorari can be amended even to add a new question presented, which is not part of the originally filed petition. When a new argument is made for the first time at the Supreme Court, relief is not precluded. See Shapiro, Geller, Bishop, Harnett and Himmelfarb, Supreme Court Practice, 10th Edition, §6.27 ("Adding to or Amending Questions Presented"), p. 472-473 (2013) ("...if the amendment or addition concerns the Questions Presented in the petition, a motion for leave to amend the petition must be filed, together with the amendment itself. Adequate reasons must be given in the motion as to why the new issue was not presented in the original petition and as to why it would be in the interests of justice to permit the amendment to be

petition and should have done so, as did the two co-defendants. There is no valid reason why Harper's counsel did not follow suit. His counsel was aware of the issue and the fact that Harper's co-defendants raised it through the appellate system in this consolidated case, and he should have known of this Court's granting certiorari in Dean. In addition, there was the time and opportunity to include the issue in Harper's pending petition. The failure to do so was not objectively reasonable under these circumstances.

When the Sixth Circuit recently addressed Harper's claims, the court acknowledged the significant disparity between Harper and his two co-defendants and said this "...may appear unfair", but it did not constitute ineffective assistance of counsel. (Op. at 7). On the contrary, both prongs of the Strickland standard are met here. There was clear prejudice to Harper because of his counsel's failure to continue to pursue the sentencing issue which his similarly situated co-defendants followed through on and eventually benefitted from. And, there was deficient performance.

Even if a Dean-type argument was seemingly foreclosed in the court of appeals by United States v. Franklin, 499 F.3d 578 (6th Cir. 2007), the granting of certiorari in Dean clearly foreshadowed a new resolution of this sentencing issue. Even prior thereto, courts foreshadowed it. Note in particular then-Judge Gorsuch's majority opinion in United States v. Smith, 756 F. 3d 1179 (10th Cir. 2014). In that

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made.")

case from 2014 (considerably prior to Harper's petition being filed in this Court in August, 2016), the Tenth Circuit found that a district court could consider the length of the mandatory §924(c) sentences as to the predicate offense sentence:

> "We don't mean to suggest that a district court must reduce a defendant's crime of violence sentence in light of a related § 924(c) sentence. We don't even mean to suggest a sentencing judge should determine what bottom-line aggregate sentence best serves her understanding of a just punishment for all of the defendant's crimes and then adjust the individual sentences to achieve that result. Instead, we acknowledge simply that a district court may at least sometimes find the length of a § 924(c) sentence relevant to the sentencing factors Congress has expressly directed it to consider when sentencing for an underlying crime."

Id., 1192 (emphasis in original). The Smith Court noted a split among courts as to this issue. "…[A] handful of recent cases from outside the resentencing context do adopt the government's (current) view that § 924(c) mandatory minimums may never influence the sentence for an underlying crime... Yet many others expressly reject just this line." Id., 1190, fn. 8, 9 (collecting cases, including Franklin, supra). When this Court granted certiorari in Dean 2 ½ months prior to the denial of certiorari in Harper, it clearly "foreshadowed" a new ruling on this issue[3]. Certainly, at that point – if not before – Harper's counsel should have added it to his pending petition and, even though it had not been raised in the court of appeals, relief at this Court would not have been precluded.

[3] Indeed, courts have recognized that there are instances in which failing to anticipate a change in the law can constitute ineffective assistance of counsel. See, e.g., Lucas v. O'Dea, 179 F.3d 412, 420 (6th Cir. 1999) ("...counsel's failure to raise an issue whose resolution is clearly foreshadowed by existing decisions might constitute ineffective assistance of counsel.").

Here, uniquely, since the other two co-defendants' counsel continued to advance the issue and received very significant relief, this certainly demonstrates that Harper's counsel's failure to do so was deficient performance resulting in severe and disparate prejudice.

Contrary to the court of appeals' view (Op. at 8), Harper's counsel's performance cannot be evaluated through the speculative notion of counsel foregoing this issue on appeal to present another "stronger" one. The instant record does not allow for conjecture as to counsel's thought process. What the record does disclose is Harper's trial counsel arguing the issue at sentencing, but abandoning it thereafter, despite both counsel for his two co-defendants' taking it "all the way" and earning substantial benefit for their clients. Harper should have had the same outcome.

In regard to the petition for a writ of certiorari filed by Harper's counsel, the Sixth Circuit opined that Harper could not show counsel's deficient performance "because he did not have a constitutional right to counsel at that stage", citing Nichols v. United States, 563 F.3d 240, 242 (6th Cir. 2009), citing Ross v. Moffitt, 417 U.S. 600, 617 (1974) (Op. at 9). However, Nichols and the reasoning upon which it relies is plainly distinguishable for a number of reasons. First, in Nichols, defense counsel made no objection at sentencing as to the relevant issue; in Harper's case, his counsel made a Dean-type objection at sentencing as to the relevant issue. Second, the Nichols defendant appealed but did not raise any argument on appeal regarding the relevant issue; while Harper's counsel

abandoned the Dean type issue on appeal, his co-defendants in the consolidated appeal did not. Third, in Nichols, no petition for a writ of certiorari was filed by Nichols but his co-defendant (Smith) filed one; Harper did file a petition in the Supreme Court not including the Dean-type issue, but his co-defendants did include this issue in their respective petitions for a writ of certiorari. Fourth, in Blakely v. Washington, 542 U.S. 296 (2004), certiorari was granted on the relevant issue; in Dean, certiorari was granted, foreshadowing a change in the law. Fifth, in Nichols, the co-defendant filed a petition for a writ of certiorari, citing Blakely; in Harper, his petition went unamended and was denied 2 ½ months after the Dean certiorari was granted. Sixth, there was no prejudice to Nichols; Harper, on the other hand, suffered extreme prejudice relative to the significant sentencing relief afforded to both of his co-defendants but not available to him.

While Harper acknowledges that this Court has held there is no constitutional right to counsel for a litigant seeking to file a discretionary petition, Ross v. Moffitt, supra, the instant case presents a different situation. Here, Harper had counsel who filed a petition for a writ of certiorari and represented him for the entire time the petition was pending. Under such circumstances, both his Fifth and Sixth Amendment rights apply; he was entitled to effective assistance by his counsel.

Moreover, having shown counsel's deficient performance, Harper has also demonstrated the actual prejudice (not simply the "reasonable probability") suffered from his attorney's failure to pursue the sentencing issue, thereby satisfying both

prongs of the Strickland ineffectiveness standard. Courts that have considered this question, arguendo, have found no denial of effective counsel where there was no ability to show that a petition would have been granted or that any prejudice occurred. See, e.g., Steele v. United States, 518 F.3d 986 (8th Cir. 2008). Here, Harper can show both that his petition would have been granted and that he has suffered prejudice.

In short, since Harper's counsel had filed a petition for a writ of certiorari in this Court, counsel had an obligation to be effective. While a person may not have a right to counsel in preparing and filing a petition for a writ of certiorari, when that person has a fully engaged legal counsel who in the course of representation has prepared and filed a petition pursuing relief on the client's behalf, the client is entitled to the due process of law and effective assistance of counsel. Otherwise, there would exist the anomalous situation of criminal defendant litigants involved in Supreme Court proceedings not being able to rely on due process and effective assistance and having counsel not held to this constitutionally required standard.

B. Dean Retroactively Applicable on Collateral Review

Harper's argument that he should be resentenced because Dean announced a new rule of law that is retroactive on collateral review was rejected by the court of appeals. (Op. at 13-14). While Harper acknowledges that at least one other court of appeals has made a similar finding, Garcia v. United States, 923 F. 3d 1242, 144-1246 (9th Cir. 2019), nevertheless, this Court has not yet ruled on whether Dean is retroactive. Harper asks that this Court consider the issue on certiorari.

Whether Dean is retroactively applicable on collateral review involves determining whether Dean's holding is a "new rule" and, if so, whether it is a new substantive or procedural rule. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989).

> "[A]s a general matter, 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.' 489 U.S., at 310, 109 S.Ct. 1060. Teague and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, '[n]ew substantive rules generally apply retroactively.' Schriro v. Summerlin, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see Montgomery v. Louisiana, 577 U.S. ___, ___, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); Teague, supra, at 307, 311, 109 S.Ct. 1060."

Welch v. United States, 136 S.Ct. 1257, 1264 (2016). Welch noted that a second category of cases will also generally have this retroactive effect. "[N]ew 'watershed rules of criminal procedure,' which are procedural rules 'implicating the fundamental fairness and accuracy of the criminal proceeding,' will also have retroactive effect. Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); see Teague, supra, at 311-313, 109 S.Ct. 1060." Welch, 136 S.Ct. at 1264 . Part of this "watershed rule" analysis of the Teague plurality incorporated Justice Harlan's dissent in Desist v. United States, 394 U. S. 244 (1969), that "concluded 'from this that all 'new' constitutional rules which significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas." Desist, 394 U.S. at 262 (Harlan, J., dissenting).

Dean announced a new rule. Teague, 489 U.S. at 301 ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the

defendant's conviction became final"). Even the government effectively conceded so in the Ninth Circuit. Garcia, 923 F.3d at 1244 ("The government does not dispute that Dean announced a new rule previously unavailable..."). The question is whether Dean is either a new substantive rule or a new watershed procedural rule.

"Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' Penry v. Lynaugh, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)." Montgomery v. Louisiana, 136 S.Ct. 718, 728 (2016). Here, Dean's new rule implicates the new prohibited "category of punishment" for the class of defendants having been convicted of an offense under 18 U.S.C. §924(c) when there is the mutually exclusive consideration of sentences for defendants having been convicted of predicate offenses and associated §924(c) counts. At Harper's sentencing, as in Dean, the district court indicated a belief that 55 years of imprisonment was more than sufficient for the sentence, but that these mandatory terms were not to be considered when determining the appropriate sentences for Harper's other counts of conviction. When this was presented on appeal by Harper's two similarly situated co-defendants, the court of appeals found that it was not error for the district court to decide against them, in light of then-existing precedent in United States v. Franklin, supra. United States v. Edmond, supra. Therefore, Dean's new rule falls within the "category of punishment" class of new substantive rules.

Contrary to the opinion of the court below (Op. at 13), this is – in reality – a

substantive change because it overturns what was considered by the courts as a "category of punishment" which was mandatory for defendants convicted of a certain offense, i.e., the previously held view was that district courts had to sentence on non-mandatory offenses as if totally separate from – and not influenced by – the mandatory §924(c) statutory sentences.

Alternatively, Dean announced a new watershed rule of criminal procedure because it "significantly improve[s] the pre-existing factfinding procedures" at sentencings in §924(c) cases, which were limited at Harper's sentencing since the district court did not believe it had discretion to consider the mandatory nature of the three §924(c) convictions relative to the sentence for the carjacking predicate and conspiracy offenses. Again, contrary to the opinion of the court below (Op. at 14), this constitutes a major change in the procedural aspects of sentencing. In light of Dean, district courts are not constrained as previously; these courts now have an understanding of the full scope of discretion to sentence defendants in §924(c) cases, particularly those with multiple §924(c) convictions resulting in mandatory prison terms of 30 years (as in Dean) or 55 years (as in Harper) that run consecutively (by statute) to other crimes of conviction. The enormity of these years of imprisonment – and the fact that the courts now can consider them relative to the entire sentence – are evidence alone of the great impact of the Dean rule.

The district court indeed exercised this new understanding of its discretion at the resentencings of Harper's two trial co-defendants. While Dean does not require district courts to consider the effect of the §924(c) mandatory sentences, nonetheless

in the instant case, the district court did consider them with a full understanding of the court's discretion and granted substantial sentencing reductions to Harper's similarly situated co-defendants. Accordingly, Harper believes that the new rule of Dean should be held retroactive because it implicates "the fundamental fairness and accuracy of the criminal proceeding". Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257 (1990).

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER A CONVICTION FOR CARJACKING BY "INTIMIDATION" QUALIFIES AS A PREDICATE OFFENSE UNDER THE "FORCE" OR "ELEMENTS" CLAUSE OF 18 U.S.C. §924(c)(3)(A).

Certain statutes regularly used in federal criminal prosecutions allow for "intimidation" only to satisfy the use of "force" in the proscribed criminal offense, including the pertinent carjacking statute in this case, 18 U.S.C. §2119, as well as bank robbery under 18 U.S.C. §2113(a). In addition to the Sixth Circuit, other circuits have held that carjacking is a crime of violence under §924(c)(3)(A). United States v. Jackson, 918 F. 3d 467, 485 (6th Cir. 2019), citing United States v. Cruz-Rivera, 904 F.3d 63 (1st Cir. 2018); United States v. Evans, 848 F.3d 242 (4th Cir. 2017); United States v. Jones, 854 F.3d 737 (5th Cir. 2017) ("The First, Fourth, and Fifth Circuits have all recently held that carjacking is a crime of violence under § 924(c)'s elements clause."). These circuits relied on the analyses of the like statute in §2113(a) to reject defense arguments that "'intimidation' does not require the use or threatened use of violent force...". Jackson, 918 F.3d at 485.

But, carjacking (or bank robbery under §2113(a)) by intimidation alone, being

accomplished without the use of actual force or causing any actual injury, directly conflicts with this Court's decision in Johnson v. United States, 559 U.S. 133, 140, 130 S.Ct. 1265 (2010) ("...the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person[]"; analysis of "violent felony" definition in §924(e)(2)(B)(i)). The instant case shows such a conflict: at trial, the government was not even required to prove that a particular person was actually "placed in fear", only that a reasonable person would be.

During the pendency of the instant case below, this Court decided United States v. Davis, 139 S. Ct. 2319, 2336 (2019), and struck down the residual clause of the crime of violence definition in §924(c)(3)(B). But, the question remains: can a threatening use of "intimidation" only, without any physical or psychological injury, qualify as a crime of violence under §924(c)(3)(A)?

Here, applying the categorical approach to analysis of the carjacking statute shows that carjacking can be committed "by force and violence" or "by intimidation". Descamps v. United States, 133 S.Ct. 2276, 2283 (2013) (defining categorical approach as "look[ing] only to the statutory definitions"). Carjacking by "intimidation" under §2119 can be accomplished by making a statement that only could theoretically, not actually, put someone in fear of bodily harm, and therefore does not satisfy the "force" clause of §924(c)(3)(A).

At the trial below, the district court instructed the jury on the "intimidation" prong of §2119 only, but did not instruct on the "force and violence" prong. (Tr. Vol. 11, R. 181, Page ID#3320-3321). The jury was instructed that "intimidation" in this

context could mean only making a statement that would cause fear of bodily harm in a "reasonable person", even if there was no proof of actual fear in the victim (Id., Page ID#3321: "It's not necessary for the government to prove that the alleged victim was actually placed in fear"). The government had only tried this case on the "intimidation" prong of §2119, and argued that proof of fear was not necessary. (Tr. Vol. 11, R. 181, Page ID#3172, 3173, 3202, 3204).

Based on its approach at trial, the government's case shows that carjacking offenses where attempted intimidation doesn't actually place fear in a victim, can "fall[] outside" the force prong in the §924(c) crime of violence definition. Moncrieffe v. Holder, 133 S.Ct. 1678, 1685 (2013) (under the categorical analysis, "a realistic probability, not a theoretical possibility" that the government would apply the statute to conduct outside the crime's generic definition is required).

Carjacking by "intimidation" under §2119 can be accomplished by making a statement that only could theoretically, not actually, put someone in fear of bodily harm, and therefore does not satisfy the "force" clause of §924(c)(3)(A). In the context of the "violent force" definition of the Armed Career Criminal Act elements clause, this Court has held that the "physical force" necessary to qualify a prior conviction as a predicate must be "force capable of causing physical pain or injury to another person." Johnson v. United States, supra, 559 U.S. at 140. "Intimidation" does not meet this Supreme Court definition for what constitutes "violent force". Granting certiorari would clarify, under the carjacking statute (as well as the bank robbery statute), whether intimidation – alone – satisfies the remaining portion of

the crime of violence definition in §924(c).

CONCLUSION AND RELIEF REQUESTED

For all the above reasons, Petitioner Frank Harper requests this Court to grant his petition for a writ of certiorari.

In the alternative, Harper moves for summary reversal under Rule 16.1, based on his Argument I, with a remand for resentencing under Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017).

Respectfully Submitted,

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