No. 19-7780

IN THE SUPREME COURT OF THE UNITED STATES

FRANK HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was deprived of effective assistance of appellate counsel because counsel did not raise a sentencing issue that was foreclosed by circuit precedent at the time the direct appeal was briefed and decided.

2. Whether petitioner was deprived of effective assistance of counsel in petitioning for a writ of certiorari before this Court, despite the fact that petitioner had no right to counsel in seeking this Court's review.

3. Whether this Court's decision in Dean v. United States, 137 S. Ct. 1170 (2017), applies retroactively on collateral review.

4. Whether federal carjacking, in violation of 18 U.S.C. 2119, is a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Harper v. United States, No. 17-cv-12690 (Feb. 8, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not published in the Federal Reporter but is reprinted at 792 Fed. Appx. 385. The order of the district court is not published in the Federal Supplement but is available at 2018 WL 783100.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2019. The petition for a writ of certiorari was filed on February 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to commit carjacking, in violation of 18 U.S.C. 371; three counts of carjacking, in violation of 18 U.S.C. 2119(1) and 2; and three counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. Am. Judgment 1-2; Pet. App. 2. He was sentenced to 757 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 3-4; Pet. App. 3. The court of appeals affirmed. Pet. App. 1-14.

1. From January 2009 through March 2012, petitioner conspired with his brother Phillip Harper and others to carjack luxury cars in Detroit and sell them. Third Superseding Indictment 1-2; Presentence Investigation Report (PSR) ¶¶ 11-16. In a typical case, one of the conspirators would threaten a parking lot attendant with a gun while the others would steal the keys for high-end cars and drive them away. See PSR ¶¶ 14-16; 815 F.3d 1032, 1039-1040. The carjackers delivered the vehicles to intermediaries, who took them to a chop shop. See PSR ¶¶ 11-12; 815 F.3d at 1038, 1040. In all, petitioner and his co-conspirators carried out five carjackings and one attempted carjacking involving 12 stolen vehicles. 815 F.3d at 1039-1040. In January and February 2011, petitioner directly participated in three of the armed carjackings. Ibid.

A federal grand jury returned a 23-count indictment against petitioner and his co-conspirators; petitioner was charged with three counts of carjacking, one count of conspiracy, and three counts of using a firearm in furtherance of a crime of violence (specifically, the carjackings). Third Superseding Indictment 1-18. Petitioner and two co-defendants went to trial, and a jury found petitioner guilty on all counts. Pet. App. 2. The district court sentenced petitioner to 97 months of imprisonment on each of the carjacking counts and 60 months of imprisonment on the conspiracy count, all to run concurrently. Am. Judgment 3; Pet. App. 2-3. The district court also imposed mandatory consecutive statutory-minimum sentences of 60 months, 300 months, and 300 months on the three Section 924(c) counts. Ibid.

The court of appeals affirmed. 815 F.3d at 1038-1048. The court rejected petitioner's arguments that the sentencing court erred in considering evidence of an uncharged shooting; that the government's alterations to a witness's trial statements resulted in a violation of his due process rights; and that the evidence was insufficient to support any of the convictions. Id. at 1039-1040, 1045-1047. The court also rejected a sentencing argument raised only by petitioner's co-defendants -- namely, that the sentencing court should have considered the statutory minimum sentences on the Section 924(c) counts when determining the sentences for the underlying crimes of violence. In rejecting the co-defendants' argument, the court relied on circuit precedent,

which required the sentencing court to "determine an appropriate sentence for the underlying crimes without consideration of the § 924(c) sentence." Id. at 1048 (quoting United States v. Franklin, 499 F.3d 578, 586 (6th Cir. 2007)).

In August 2016, petitioner and his co-defendants each filed petitions for a writ of certiorari. See Harper v. United States, No. 16-160 (Aug. 2, 2016); Edmond v. United States, No. 16-5441 (Aug. 1, 2016); (Phillip) Harper v. United States, No. 16-5461 (Aug. 1, 2016). At the certiorari stage, petitioner raised a single evidentiary issue. 16-160 Pet. at i, 11-19. Petitioner's co-defendants raised multiple issues, including whether the sentencing court erred in declining to take the Section 924(c) sentences into account when determining the sentences for the underlying offenses. 16-5441 Pet. at i; 16-5461 Pet. at i.

In October 2016, almost three months after those petitions were filed, this Court granted certiorari in Dean v. United States, 137 S. Ct. 1170 (2017), to consider whether district courts have discretion to consider the mandatory consecutive sentence under Section 924(c) when sentencing for the underlying offense. In January 2017, the Court denied petitioner's petition for a writ of certiorari. 137 S. Ct. 619 (2017) (No. 16-160). In April 2017, the Court held in Dean that sentencing courts may consider the mandatory minimum on the Section 924(c) count when imposing a sentence for the underlying offense, abrogating the Sixth Circuit's contrary precedent. See 137 S. Ct. at 1176-1177.

Thereafter, the Court granted the petitions filed by petitioner's co-defendants, vacated the court of appeals' judgment with respect to them, and remanded for further consideration in light of Dean. Harper v. United States, 137 S. Ct. 1577 (2017); Edmond v. United States, 137 S. Ct. 1577 (2017). On remand, the district court reduced the co-defendants' sentences for their predicate offenses. Pet. App. 4.

2. In June 2016, petitioner separately filed a pro se motion to vacate his sentence under 28 U.S.C. 2255, arguing that carjacking is not a crime of violence under Section 924(c). D. Ct. Doc. 256, at 1-7 (June 21, 2016) (2255 Motion). Section 924(c)(3) defines a "crime of violence" as a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or 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)(B). Petitioner argued that carjacking does not qualify as a crime of violence under Section 924(c)(3) because Section 924(c)(3)(B) was unconstitutionally vague, and because carjacking could involve the use of "minimal force," rather than "force capable of causing physical pain or injury." 2255 Motion 3; see id. at 3-6.

Petitioner subsequently obtained appointed counsel and filed an amended motion, in which he renewed the argument that Section

924(c)(3)(B) was unconstitutionally vague "in order to preserve it for further appellate review." D. Ct. Doc. 282, at 4-5 (Aug. 16, 2017). He also argued (as relevant here) that he was entitled to resentencing under Dean because his appellate counsel was ineffective for failing to raise a Dean-type claim on direct appeal and in his petition for certiorari, or because Dean applies retroactively on collateral review. Id. at 5-11.

The district court denied the motion. D. Ct. Doc. 294 (Feb. 8, 2018) (2255 Order). It observed that under then-existing circuit precedent, carjacking was a crime of violence under Section 924(c)(3)(B). Id. at 3-4. It also determined that appellate counsel was not ineffective in declining to raise a sentencing argument on direct appeal because "counsel could not have predicted the development of the law in Dean" and that counsel was not constitutionally ineffective at the certiorari stage because petitioner had "no constitutional right to counsel" at that stage of the proceedings. Id. at 7 (citation omitted). The court further determined that petitioner could not demonstrate prejudice because "the court did take the 55 years of mandatory minimums * * * into account" in choosing to run petitioner's sentences for the conspiracy and carjacking cases concurrently rather than "consecutive to one another." Id. at 8. And, agreeing with "every federal court that has ruled on this issue," the court found that Dean did not announce a new substantive rule or a watershed procedural rule so as to apply retroactively on collateral review.

Id. at 8; see id. at 8-9. The district court denied a certificate of appealability (COA). See Pet. App. 4.

3. The court of appeals granted a COA and affirmed. Pet. App. 1-14.

The court first rejected petitioner's claim that carjacking was not a crime of violence under Section 924(c). Pet. App. 5-6. The court recognized that Section 924(c)(3)(B) was unconstitutionally vague under this Court's intervening decision in United States v. Davis, 139 S. Ct. 2319, 2336 (2019). Pet. App. 5-6. But it explained that "carjacking constitutes a crime of violence" under Section 924(c)(3)(A). Id. at 6. In particular, the court of appeals observed that "the commission of carjacking by 'intimidation necessarily involves the threatened use of violent physical force,'" thereby satisfying Section 924(c)(3)(A). Ibid. (quoting United States v. Jackson, 918 F.3d 467, 486 (6th Cir. 2019)).

The court of appeals next rejected petitioner's argument that his appellate counsel was ineffective for failing to raise "a Dean-type claim" either in the direct appeal or in the petition for certiorari. Pet. App. 7; see id. at 6-12. The court of appeals observed that at the time counsel filed petitioner's opening brief on direct appeal, 15 months before this Court granted certiorari in Dean, Sixth Circuit precedent "foreclosed any Dean-type argument." Id. at 8. The court explained that petitioner's appellate counsel "cannot be faulted for failing to predict the

future development of the law in Dean." Ibid. The court emphasized that effective appellate advocacy requires "winnowing out weaker arguments on appeal," id. at 7 (brackets and citation omitted), and found that petitioner could not establish that the "issue not presented was clearly stronger than issues that counsel did present," id. at 8 (citation and internal quotation marks omitted). The court additionally explained that petitioner's counsel was not ineffective in failing to raise a Dean-type claim at the certiorari stage, because "there is no right to counsel at the petition-for-certiorari stage and where there is no constitutional right to counsel there can be no deprivation of effective assistance." Id. at 11-12 (citation and internal quotation marks omitted).

Finally, the court of appeals determined that Dean was not retroactive on collateral review under the framework set out in Teague v. Lane, 489 U.S. 288, 311 (1989). Pet. App. 13-14. The court of appeals explained that Dean did not announce a "substantive rule" because it did not "alter[ ] the range of conduct or the class of persons that the law punishes." Id. at 13 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)). And it explained that Dean did not announce a "watershed rule of criminal procedure" because it did not "alter[ ] [the] understanding of the bedrock procedural elements essential to the fairness of a proceeding." Id. at 14 (quoting Whorton v. Bockting, 549 U.S. 406, 421 (2007)).

ARGUMENT

Petitioner contends that his attorneys were ineffective during the direct appeal or at the certiorari-stage for not arguing that the district court erred in declining to consider his mandatory minimum sentences under 18 U.S.C. 924(c) in imposing sentences for the other counts (Pet. 8-19); that Dean v. United States, 137 S. Ct. 1170 (2017), applies retroactively on collateral review (Pet. 19-23); and that carjacking in violation of 18 U.S.C. 2119 is not a "crime of violence" under Section 924(c)(3)(A) (Pet. 23-26). The court of appeals' decision was correct and does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner first contends that, given "[t]he unique facts and circumstances of this case," petitioner's appellate counsel "performed deficiently" and that he was "unfairly prejudiced as a result." Pet. 8, 11. That fact-bound claim does not warrant this Court's plenary review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). In any event, the court of appeals correctly determined that petitioner could not show that his counsel was ineffective.

a. Petitioner first contends that his appellate counsel was ineffective for failing to argue on direct appeal that the district court had discretion at sentencing to consider the mandatory minimums required under the Section 924(c) counts when determining

a sentence for the underlying predicate offenses. The court of appeals correctly rejected that ineffective-assistance claim. See Pet. App. 6-9. In order to establish ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). In applying Strickland's performance element, courts are "highly deferential," making every effort to eliminate "the distorting effects of hindsight." Id. at 689. For that reason, courts start with "a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citation and internal quotation marks omitted).

Section 924(c) requires a mandatory consecutive sentence of at least five years of imprisonment for a defendant who uses or carries a firearm during and in relation to a predicate crime of violence or drug trafficking crime. 18 U.S.C. 924(c)(1)(A)(i). At the time of petitioner's direct appeal, circuit precedent held that "[t]he sentencing court must determine an appropriate sentence for the underlying crimes without consideration of the § 924(c) sentence." United States v. Franklin, 499 F.3d 578, 586 (6th Cir. 2007). In Dean, this Court determined that, where a defendant is convicted of both the predicate offense and a violation of Section 924(c), a sentencing court may properly

consider the fact of the mandatory consecutive sentence under Section 924(c) "when calculating an appropriate sentence for the predicate offense." 137 S. Ct. at 1178; see id. at 1176.

This Court granted certiorari in Dean approximately eight months after the court of appeals entered judgment in the direct appeal in this case. See 137 S. Ct. 368 (2016). Petitioner's counsel was not ineffective for failing to raise an argument foreclosed by circuit precedent. Indeed, as this Court has recognized in the context of state-court appeals, "even the most informed counsel" will often "fail to anticipate" an appellate court's willingness to reconsider a prior holding or the likelihood that the precedent will be repudiated by a controlling decision from another court. Smith v. Murray, 477 U.S. 527, 536 (1986). "Viewed in light of [the governing] law at the time [counsel] submitted his opening brief," counsel's decision not to challenge circuit precedent "fell within the 'wide range of professionally competent assistance' required under the Sixth Amendment." Ibid. (citation omitted).

That is particularly true given the availability of stronger arguments. Petitioner's appellate brief presented several substantial challenges to his conviction, which the court of appeals addressed in a published opinion. See 815 F.3d at 1038-1040, 1045-1047; Pet. C.A. Br. 14-67. "Th[e] process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the

hallmark of effective appellate advocacy." Smith, 477 U.S. at 536 (citation and internal quotation marks omitted); see Jones v. Barnes, 463 U.S. 745, 753 (1983) (explaining that "[a] brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the great advocate John W. Davis, 'go for the jugular'" (citation omitted)). What is more, each of the arguments petitioner chose to pursue would lead either to vacatur or reversal of the entire conviction; the sentencing argument, by contrast, even if successful, would have no effect on 660 months of petitioner's 757-month sentence.

Petitioner observes (Pet. 12-13) that his two co-defendants did raise the sentencing claim in their briefs on direct appeal. But that does not establish that petitioner's counsel was ineffective for taking a different tack. Petitioner's co-defendants had a different set of strategic considerations; in particular, petitioner's lead argument on appeal was specific to him. See 815 F.3d at 1045-1046. Furthermore, each co-defendant had received a longer aggregate sentence for the predicate offenses than petitioner did. See D. Ct. Doc. 210, at 4 (Oct. 28, 2014); D. Ct. Doc. 220, at 4 (Nov. 7, 2014). But even setting those differences aside, the fact that other attorneys could (and did) exercise their judgment differently does not establish that the strategy employed by petitioner's counsel fell outside "the wide

range of reasonable professional assistance." Richter, 562 U.S. at 104 (citation and internal quotation marks omitted).[1]

Approximately eight months after the court of appeals entered judgment in the direct appeal in this case, this Court granted certiorari in Dean. It ultimately held that, where a defendant is convicted of both the predicate offense and a violation of Section 924(c), a sentencing court may properly consider the fact of the mandatory consecutive sentence under Section 924(c) "when calculating an appropriate sentence for the predicate offense." 137 S. Ct. at 1178; see id. at 1176. Petitioner argues (Pet. 16 & n.3) that the court of appeals' rejection of his ineffective assistance claim here is inconsistent with a decision of that same court suggesting that, in a "rare case," counsel can be ineffective for failing to raise an issue where a development in the law is "clearly foreshadowed" by other decisions. Lucas v. O'Dea, 179 F.3d 412, 420 (6th Cir. 1999). Petitioner's claim based on an asserted intracircuit disagreement does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). And here, nothing "clearly foreshadowed," that this Court would, before petitioner's conviction became final, grant certiorari and agree with the one circuit that had reached the

[1] Further illustrating that the co-defendants were differently situated, the district court -- which was also the sentencing court -- took the view that there was no "prejudice" to petitioner, 2255 Order 7-8, yet that same court significantly reduced the co-defendants' sentences on remand. See D. Ct. Doc. 310, at 1, 4 (May 9, 2018); D. Ct. Doc. 311, at 1, 4 (May 9, 2018).

conclusion ultimately adopted in Dean. See United States v. Smith, 756 F.3d 1179, 1193 (10th Cir. 2014). In any event, given the substantial issues petitioner's counsel chose to pursue, and the far more limited relief available under the Dean-type argument, petitioner cannot establish that the sentencing issue was "clearly stronger" than those his counsel did press. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citation omitted).

Moreover, review is unwarranted for the additional reason that petitioner cannot establish prejudice. The court of appeals rejected his co-defendants' sentencing arguments, 815 F.3d at 1048, and would doubtless have done the same if petitioner had raised the identical argument on direct appeal. Petitioner's co-defendants obtained relief because their attorneys made the separate strategic judgment to raise a Dean-type issue in their petitions for certiorari before this Court. Because petitioner cannot establish that his certiorari-stage counsel's separate decision not to raise this issue in the certiorari petition rendered counsel constitutionally ineffective, see pp. 14-15, infra, petitioner would not be entitled to relief even if his counsel performed deficiently in not raising the issue on direct appeal.

b. The court of appeals also correctly rejected petitioner's claim that counsel was ineffective at the certiorari stage. Defendants have no constitutional right to counsel in discretionary appeals or when filing petitions for certiorari in

this Court. Ross v. Moffitt, 417 U.S. 600, 612-618 (1974). As this Court explained in Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam), a defendant who has "no constitutional right to counsel" cannot be "deprived of the effective assistance of counsel" by his counsel's deficient performance. Id. at 587-588.

Petitioner contends (Pet. 19) that "since [his] counsel had filed a petition for a writ of certiorari in this Court, counsel had an obligation to be effective." That argument is foreclosed by Torna, where a defendant's counsel filed an untimely application for review in the Florida Supreme Court, and this Court explained that because the defendant had "no constitutional right to counsel," he "could not be deprived of the effective assistance of counsel" by his "retained counsel's failure" to file a non-deficient petition. 455 U.S. at 587-588.

2. Petitioner alternatively contends Dean announced a new rule of law that is retroactive on collateral review. Pet. 19. That contention likewise lacks merit and does not warrant review.

As petitioner acknowledges (Pet. 19), every court of appeals that has considered the question has agreed with the decision below that Dean does not apply retroactively. Worman v. Entzel, 953 F.3d 1004, 1009-1011 (7th Cir. 2020); Garcia v. United States, 923 F.3d 1242, 1245-1246 (9th Cir. 2019); Habeck v. United States, 741 Fed. Appx. 953, 954 (4th Cir. 2018) (per curiam), cert. denied, 139 S. Ct. 1364 (2019); In re Dockery, 869 F.3d 356, 356 (5th Cir. 2017) (per curiam); see Pet. App. 13-14. "A new rule applies

retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Whorton v. Bockting, 549 U.S. 406, 416 (2007) (brackets, citation, and internal quotation marks omitted).

As the courts of appeals have uniformly recognized, this Court's decision in Dean does not fall into either category. First, because Dean relates to "the manner of determining" the defendant's sentence, Schriro v. Summerlin, 542 U.S. 348, 353 (2004), it is a procedural rule, not a substantive one. As the Seventh Circuit has explained, because Dean addresses "the proper and available scope of discretion district judges can exercise in sentencing defendants," it "regulates sentencing procedure." Worman, 953 F.3d at 1010. Petitioner nevertheless contends (Pet. 21) that Dean announced a substantive rule because it "implicates the new prohibited 'category of punishment'" for a class of defendants. But as the Ninth Circuit explained in rejecting a similar argument, "Dean's rule is permissive, not mandatory." Garcia, 923 F.3d at 1245. Because a sentencing court remains free to disregard the 924(c) sentence in deciding on the sentences for the underlying crimes, or to consider it and still impose the same punishment that it would have otherwise imposed, Dean does not "prohibit" any category of punishment. Ibid. (brackets and citation omitted).

Second, Dean did not announce a watershed rule of criminal procedure. "In order to qualify as watershed," a new rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton, 549 U.S. at 418 (citations and internal quotation marks omitted). That category of cases is "extremely narrow." Id. at 417 (citation omitted). Indeed, the test is so "demanding," that "this Court has yet to announce a new rule of criminal procedure capable of meeting it." Ramos v. Louisiana, No. 18-5924 (Apr. 20, 2020), slip op. 24. Against that backdrop, a rule "governing what a judge may consider at sentencing" likewise cannot satisfy those requirements. Worman, 953 F.3d at 1011; see Garcia, 923 F.3d at 1246.[2] Petitioner asserts (Pet. 22) that Dean announced "a new watershed rule of criminal procedure" because it can have a large impact on a defendant's sentence. Even assuming that were a correct characterization of Dean's effect, that would not be enough to classify it as a watershed rule. See, e.g., Summerlin, 542 U.S. at 355-358 (holding that this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), which held that the death

[2] This Court recently granted certiorari in Edwards v. Vannoy, No. 19-5807 (May 4, 2020), to consider whether the unanimous jury requirement in Ramos, supra, is retroactive. No sound basis exists to hold this petition pending the disposition of Edwards. In light of the evident differences between the rule in Dean and the rule in Ramos, even a holding that Ramos is retroactive would not affect the courts of appeals' unanimous determination that Dean is not.

penalty could not be imposed in certain circumstances, did not qualify as a watershed rule).

3. Petitioner finally contends (Pet. 23-25) that the court of appeals erred in determining that carjacking is a crime of violence under Section 924(c)(3)(A). This Court has recently and repeatedly denied review of that issue,[3] and it should follow the same course here.

a. A person commits carjacking if, "with the intent to cause death or serious bodily harm," he "takes a motor vehicle * * * from the person or presence of another by force and violence or by intimidation." 18 U.S.C. 2119. A carjacking offense categorically qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

As petitioner acknowledges (Pet. 23), every court of appeals to consider the question has held that federal carjacking qualifies

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[3] See, e.g., Estell v. United States, 140 S. Ct. 490 (2019) (No. 19-6131); Shaw v. United States, 140 S. Ct. 315 (2019) (No. 18-9258); Paul v. United States, 140 S. Ct. 178 (2019) (No. 18-9643); Ovalles v. United States, 139 S. Ct. 2716 (2019) (No. 18-8393); Williams v. United States, 139 S. Ct. 1619 (2019) (No. 18-7470); Murray v. United States, 139 S. Ct. 1291 (2019) (No. 18-6569); Lenihan v. United States, 139 S. Ct. 1230 (2019) (No. 18-7387); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Cooper v. United States, 139 S. Ct. 411 (2018) (No. 17-8844); Horne v. United States, 139 S. Ct. 208 (2018) (No. 18-5061); Johnson v. United States, 139 S. Ct. 70 (2018) (No. 17-8632); Leon v. United States, 139 S. Ct. 56 (2018) (No. 17-8008); Stevens v. United States, 138 S. Ct. 2676 (2018) (No. 17-7785); Chaney v. United States, 138 S. Ct. 2675 (2018) (No. 17-7592); Dial v. United States, 138 S. Ct. 647 (2018) (No. 17-6036).

as a "crime of violence" under Section 924(c)(3)(A). See Estell v. United States, 924 F.3d 1291, 1292-1293 (8th Cir.), cert. denied, 140 S. Ct. 490 (2019); United States v. Jackson, 918 F.3d 467, 484-486 (6th Cir. 2019); Ovalles v. United States, 905 F.3d 1300, 1303-1304 (11th Cir. 2018) (per curiam), cert. denied, 139 S. Ct. 2716 (2019); United States v. Cruz-Rivera, 904 F.3d 63, 65-66 (1st Cir. 2018), cert. denied, 139 S. Ct. 1391 (2019); United States v. Gutierrez, 876 F.3d 1254 (9th Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 1602 (2018); United States v. Kundo, 743 Fed. Appx. 201 (10th Cir. 2018); 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, 244 (4th Cir.), cert. denied, 137 S. Ct. 2253 (2017); United States v. Mohammed, 27 F.3d 815, 819 (2d Cir.), cert. denied, 513 U.S. 975 (1994). Those courts have uniformly recognized that "[t]he act of taking a motor vehicle 'by force and violence' requires the use of violent physical force, and the act of taking a motor vehicle 'by intimidation' requires the threatened use of such force." Evans, 848 F.3d at 247; see ibid. ("We are not aware of any case in which a court has interpreted the term 'intimidation' in the carjacking statute as meaning anything other than a threat of violent force."); cf. Holloway v. United States, 526 U.S. 1, 12 (1999) (holding that Section 2119 requires "pro[of] 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").

b. Petitioner contends (Pet. 23-25) that the term "intimidation" in Section 2119 does not require a threat of "physical force" as this Court has defined that term in Curtis Johnson v. United States, 559 U.S. 133 (2010). See id. at 140 (holding that "'physical force'" in 18 U.S.C. 924(e)(2)(B)(i) means "violent force -- that is, force capable of causing physical pain or injury to another person"). But even assuming that Curtis Johnson's definition of "physical force" under the ACCA would limit that term's application in the separate context of Section 924(c)(3)(A), the carjacking statute requires a use of force or a threat of force sufficient to induce a victim to part with a vehicle, 18 U.S.C. 2119. This Court has recently made clear that the force necessary to overcome even slight resistance by a victim is inherently "violent," see Stokeling v. United States, 139 S. Ct. 544, 553-554 (2019), and the force threatened in a carjacking necessarily meets or exceeds that standard. No court has "interpreted the term 'intimidation' in the carjacking statute as meaning anything other than a threat of violent force." Evans, 848 F.3d at 247; accord Jackson, 918 F.3d at 485-486.

Petitioner further objects (Pet. 24-25) that "intimidation" can be defined as a statement that would put a "reasonable person" in fear of bodily harm, regardless of whether a particular victim was subjectively put in fear. But Section 2119 requires proof

"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." Holloway, 526 U.S. at 12. Petitioner offers no authority for the proposition that a specific reaction from the actual victim is required to make a statement a threat in those circumstances. And in any event, even if subjective effect on the specific victim were relevant, the defendant must engage in "intimidation" that actually induces the victim to part with the vehicle. 18 U.S.C. 2119. Carjacking by "intimidation" therefore falls within Section 924(c)(3)(A)'s definition of a "crime of violence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL*
Acting Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

WILLIAM A. GLASER
Attorney

MAY 2020

* The Solicitor General is recused in this case.