No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROLANDO CANDIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal carjacking statute, 18 U.S.C. § 2119, which may be violated by means of "intimidation" through threats of mental or non-corporeal harm, categorically qualifies as a "crime of violence" under the elements clause of 18 U.S.C. § 924(c)(3)(A).

RELATED PROCEEDINGS

Petitioner is unaware of any related cases pending before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

PETITION FOR WRIT OF CERTIORARI

Petitioner Rolando Candia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's summary affirmance order is unreported. (App. 1a.) The Ninth Circuit's decision in *United States v. Gutierrez* (App. 2a–5a), upon which its dispositive order was based, is reported at 876 F.3d 1254.

JURISDICTION

The Ninth Circuit issued its decision on June 5, 2020. (App. 1a.) This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.3, as modified by the Court's March 19, 2020 order extending the deadline for any petition for a writ of certiorari, because it was filed within 150 days of the Ninth Circuit's decision.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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 U.S.C. § 924(c)(3) 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.

The federal carjacking statute, 18 U.S.C. § 2119, reads as follows:

> 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.

INTRODUCTION

Rolando Candia challenges his conviction for brandishing a firearm during and in relation to a "crime of violence," under 18 U.S.C. § 924(c). The predicate "crime of violence" underlying this conviction was Candia's violation of the federal carjacking statute, 18 U.S.C. § 2119. After pleading guilty to these crimes, Candia collaterally attacked his conviction and sentence, arguing that carjacking no longer qualified as a crime of violence, after this Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *United States v. Davis*, 139 S. Ct. 2319 (2019).

The district court denied this motion, but granted a certificate of appealability. The Ninth Circuit, however, summarily affirmed, relying on its precedent in *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017), in which it held that federal carjacking qualified as a crime of violence under the still-constitutional elements clause of section 924(c). This Court should grant review because the Ninth Circuit's holding conflicts with multiple lines of this Court's precedent concerning the categorical approach.

First, carjacking by means of "intimidation" may be committed through threats only of mental or psychological harm, not of a physical injury. Thus, the Ninth Circuit's holding conflicts with this Court's precedent in *Johnson v. United States*, 558 U.S. 133, 140 (2010), and *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019), both of which interpreted a materially identical elements clause as requiring a degree of force that is capable of causing *physical* pain or injury.

Second, federal carjacking may also be committed by means of threats to inflict legal, reputational, or economic harm. Again, this manner of violating the federal

carjacking statute is not sufficient to comply with this Court's *Johnson* and *Stokeling* line of cases. Third, carjacking cannot be a crime of violence because it can be committed without intentional conduct, whereas, Candia maintains, a crime of violence requires intentional conduct, an issue currently pending before the Court in *Borden v. United States*, No. 19-5410.

This case presents a question of exceptional importance for defendants facing mandatory consecutive sentences under section 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 federal carjacking offenses from section 924(c).

STATEMENT OF THE CASE

1. A 2013 indictment charged Rolando Candia with carjacking, in violation of 18 U.S.C. § 2119; use of a firearm in furtherance of a crime of violence, i.e., carjacking, in violation of 18 U.S.C. § 924(c); possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1); and possession of a firearm in furtherance of a drug trafficking crime, in violation of section 924(c). (Excerpts of Record (ER) 94–96.) In 2014, Candia agreed to plead guilty to the carjacking and the section 924(c) gun charge tied to the carjacking count. (ER 63–69.) The district court accepted the plea agreement, and imposed a 180-month sentence, comprised of 96 months on the carjacking charge, and 84 months, to be served consecutively, on the section 924(c) charge. (ER 85–86.) Candia did not file a direct appeal.

2. On June 20, 2016, Candia filed a pro se motion under 28 U.S.C. § 2255 to collaterally attack his conviction and sentence. (ER 70–84.) Soon after, through

counsel, Candia filed an amended section 2255 motion. Candia argued that his section 924(c) conviction for use of a firearm in furtherance of carjacking no longer qualified as a crime of violence after this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act's "violent felony" definition was void for vagueness. Specifically, Candia argued that the holding in *Johnson* extended to section 924(c)'s similarly phrased definition of "crime of violence," and that carjacking qualified as a crime of violence only under the unconstitutionally vague residual clause. (ER 29–51.)

Over the next three years, Candia's case was stayed and supplemental briefing was filed as the Ninth Circuit and this Court wrestled with whether the residual clause contained in section 924(c) was void for vagueness. (ER 104–05.) Ultimately, this Court held that section 924(c)'s residual clause was void for vagueness. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

On October 2, 2019, the district court nevertheless denied Candia's section 2255 motion. (ER 19.) In its order denying relief, the district court concluded that "Candia's plea agreement does not preclude the Court from reaching the merits of Candia's amended § 2255 motion," (ER 10), and it rejected the government's timeliness and procedural default arguments, (ER 12, 14–15).

Turning to the merits, the court noted Candia's acknowledgment that the Ninth Circuit had held, in *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017), that carjacking qualified as a crime of violence under the elements clause, so no recourse to the constitutionally infirm residual clause definition was required. The district

court stated that it found itself "bound" by that holding. (ER 17.) The district court thus denied Candia's motion, but granted a certificate of appealability because "reasonable jurists could debate whether federal carjacking is categorically a crime of violence under the elements cause of § 924(c)(3)." (ER 18.)

3. On March 2, 2020, Candia timely appealed. (ER 20.) On appeal, Candia again argued that federal carjacking does not qualify as a crime of violence under elements clause of section 924(c)(3)(A). (Ninth Cir. Dkt. 8.) On June 5, 2020, the Ninth Circuit granted the government's motion for summary affirmance, stating that its prior decision in *Gutierrez* was "applicable to this case and controlling as to the outcome of this appeal." (Ninth Cir. Dkt. 14.)

REASONS FOR GRANTING THE WRIT

I. 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).

In *United States v. Davis*, this Court held that the definition of "crime of violence" contained in the residual clause of 18 U.S.C. § 924(c)(3)(B) was unconstitutionally void for vagueness. 139 S. Ct. 2319, 2336 (2019). Thus, after *Davis*, an offense validly qualifies as a crime of violence only if it satisfies the still-constitutional definition of "crime of violence" contained in the elements clause of section 924(c)(3)(A). *See* 18 U.S.C. § 924(c)(3)(A) (defining "crime of violence" as a felony offense that " has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). Contrary to the Ninth Circuit's holding in *Gutierrez*, carjacking does not satisfy the elements clause of section 924(c). *But see Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir.

2019) (holding that federal carjacking qualifies as a crime of violence under the elements clause); *Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019) (same); *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019) (same); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017) (same); *United States v. Evans*, 848 F.3d 242, 247–48 (4th Cir. 2017) (same); *United States v. Jones*, 854 F.3d 737, 740–41 (5th Cir. 2017) (same).

A. Carjacking is not categorically a crime of violence because it can be committed by threat of a merely *mental* injury; whereas, crimes of violence require, at least, threats of *physical* injury.

1. **Under *Davis*, the categorical approach applies to section 924(c).**

With *Davis* retroactively invalidating section 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 is section 924(c)(3)(A). Carjacking does not meet this definition under section 924(c).

In *Davis*, this Court held that whether an offense meets the definition of a "crime of violence" contained in the residual clause of section 924(c)(3)(B) must be analyzed using the longstanding "categorical approach," first promulgated in *Taylor v. United States*, 495 U.S. 575 (1990). *See Davis*, 139 S. Ct. at 2327–31. Under *Taylor*, whether a predicate crime qualifies as a "crime of violence" depends on the elements of the statutory offense, not a defendant's individual conduct. *See* 495 U.S. at 599–601. When applying the categorical approach, courts "must presume that the [predicate offense] 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the

generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

In *Davis*, this Court concluded that under the categorical approach, the residual clause was void for vagueness and cold not provide a constitutional basis to support a criminal conviction under section 942(c). *See* 139 S. Ct. at 2336. Accordingly, after *Davis*, a section 924(c) conviction and sentence is only lawful if the predicate "crime of violence" satisfies the still-constitutional elements clause of section 924(c)(3)(A), the "elements clause." *See, e.g.*, *United States v. Begay*, 934 F.3d 1033, 1038 (9th Cir. 2019) ("Because the Supreme Court declared 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague in *United States v. Davis*, we need only determine whether second-degree murder constitutes a crime of violence under the 'elements clause' in subsection (A)." (citation omitted)).

Thus, federal courts must use the categorical approach to determine whether federal carjacking is a "crime of violence" under section 924(c). The elements clause of section 924(c) defines a crime of violence as one 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). The key term to interpret is "physical force." If carjacking necessarily entails the use, attempted use, or threatened use of "physical force," then carjacking is categorically a crime of violence. If carjacking can be committed *without* "physical force" of the threat of physical force, then carjacking is not a crime of violence.

Of critical importance to Candia's claim, this Court has adopted a definition of "physical force" that excludes mental injury and the threat thereof. Specifically,

this Court has held that ""physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 1490; *see Gutierrez*, 876 F.3d at 1256 (citing *Johnson* for this proposition). The Court has explained that "[t]he adjective 'physical' is clear in meaning . . . distinguishing physical force from, for example, intellectual force or emotional force." *Johnson*, 559 U.S. at 138; *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (quoting this passage from *Johnson*). Mental injury alone—or the threat thereof—would not satisfy the "crime of violence" requirements, as defined by this Court. *See id.*

2. Carjacking by intimidation can be committed by threats of merely mental injury, not just corporeal harm. The definition of a "crime of violence," however, does not include such forms of mental-only harm.

The federal carjacking statute does not meet the level-of-force standard articulated in *Johnson* and *Stokeling*, and the Ninth Circuit's contrary holding in *Gutierrez* misinterpreted the statute and misapplied this Court's precedent. The Ninth Circuit's analysis in *Gutierrez* begins correctly, when it asks "whether the lease serious form of the offense [of carjacking] meets the *Johnson* standard" of physical force. *Gutierrez*, 876 F.3d at 1256. The carjacking statute reads:

> Whoever, with the intent to cause death or serious bodily harm[,] takes a motor vehicle . . . 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.

18 U.S.C. § 2119.

In *Gutierrez*, the Ninth Circuit reviewed the carjacking statute and held that the "least serious" form of carjacking—carjacking "by intimidation"—still necessarily involved the threat of physical force. 876 F.3d at 1256. Its analysis relied on *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990), a bank robbery case. *Gutierrez*, 876 F.3d at 1257. According to *Gutierrez*, the circuit had held "that 'intimidation' as used in the federal bank robbery statute requires that a person take property 'in such a way that would put an ordinary, reasonable person in fear of bodily harm,' which necessarily entails the 'threatened use of physical force.'" *Id.* (internal citations omitted). *Gutierrez* went on to say that "[a] defendant cannot put a reasonable person in fear of bodily harm without threatening to use 'force capable of causing physical pain or injury.'" *Id.* (quoting *Johnson*, 559 U.S. at 140). *Gutierrez* further cited Justice Scalia's concurrence in *United States v. Castleman*, which noted that "it is impossible to cause bodily injury without using force 'capable of' producing that result." 572 U.S. 157, 174 (2014) (Scalia, J., concurring in part and concurring in the judgment). *Gutierrez* stated that "[w]e see no reason" to interpret the carjacking statute differently from *Selfa's* interpretation of the bank robbery statute. *Gutierrez*, 876 F.3d at 1257. *Gutierrez* concluded by holding that carjacking by intimidation required a taking "through conduct that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of violent physical force." *Id.* In *Gutierrez's* view, carjacking always

requires, at minimum, a threat of physical force, so it would always be a crime of violence under section 924(c). This interpretation is incorrect, as described below.

The conclusion that carjacking by intimidation necessarily involves a threat of physical injury is incorrect because it ignores the specific definition of "bodily" harm provided by the carjacking statute—a definition that includes mental, non-corporeal harm. This argument was not presented to the Ninth Circuit in *Gutierrez*, and thus was not addressed by that Court. (Nor did it address that novel argument raised in this case, instead summarily affirming based on *Gutierrez*.)

"[W]e begin, as we must, with a careful examination of the statutory text." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct 1718, 1721 (2017). The text of the carjacking statute cross-references 18 U.S.C. § 1365 to define "bodily injury." 18 U.S.C. § 2119(2) (defining "serious bodily injury" with reference to definition in 18 U.S.C. § 1365). In turn, section 1365's definition of bodily injury includes not only the traditional, physical harm associated with bodily injury, 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," according to the statutory definition. This non-corporeal definition of "bodily harm" is not addressed by *Gutierrez* or similar decisions of other circuits. But this broader definition of bodily harm means that *Gutierrez* and other similar opinions were

wrong to hold that all threats of bodily harm necessarily entail threats of physical force.

Traditional canons of statutory construction demonstrate that this broad definition of "bodily" must apply in the carjacking context. First, in the carjacking statute, Congress specifically cross-references section 1365, as it does in other—but not all—criminal statutes referring to "bodily injury." *See, e.g.*, 18 U.S.C. § 37 (violence at international airport), 18 U.S.C. § 113 (assault); 18 U.S.C. § 1111 (murder); 8 U.S.C. § 1324(a)(B)(iii) (harboring aliens); 18 U.S.C. § 1347 (health care fraud); 18 U.S.C. § 1992 (terrorist attacks against mass transportation). The carjacking statute's cross reference to a specific definition of "bodily injury" shows a deliberate choice to give "bodily" a broad definition here.[1]

Where Congress has sought to limit "bodily" injury to physical harm, it has done so by not cross-referencing Section 1365, or by specifically excluding the mental injury component. For example, the hate crime statute, 18 U.S.C. § 249(c)(1), explicitly 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 construction, where a statute (like the carjacking statute) specifically incorporates Section 1365's "bodily injury" definition without a limitation like the hate crime statute's, that is an

[1] The interchangeable use of "bodily harm" and "bodily injury" in the text of the carjacking statute also shows that these terms mean the same thing. *Compare* 18 U.S.C. § 2119 ("serious bodily harm"), *with* 18 U.S.C. § 2119(2) ("serious bodily injury"). The first paragraph of the statute refers to "the intent to cause death or serious bodily harm" and is then paralleled in the third and fourth paragraph of the statute, which discuss "serious bodily injury" and "death." 18 U.S.C. § 2119(2)(3). Thus, the structure of the statute shows that "bodily harms' means the same as "bodily injury."

indication that impairment of a mental faculty satisfies the definition of "bodily injury."

The legislative history of the carjacking statute provides additional reason to recognize the mental dimension of "bodily" harm. Congress has consistently expanded the reach of the carjacking statute to broader types of conduct. This expansion is consistent with including, rather than excluding, "mental" injury from the elements of carjacking. In 1994, for example, Congress amended the carjacking statute to punish not only car thefts that involved guns, but also those that involved no weapon at all. Pub. L. 103–322, tit. VI, § 60003(a)(14), 108 Stat. 1970. (deleting firearm possession from original statute).

In 1996, Congress specifically added sexual abuse and aggravated sexual abuse to the definition of "serious bodily injury" in response to a First Circuit decision that held a rape committed during a carjacking was not a "serious bodily injury" because there was no evidence of *physical* harm. Carjacking Correction Act of 1996, Pub. L. 104-217, 110 Stat. 3020; H.R. Rep. No. 104-787 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3409. Notably, in that First Circuit decision, Judge Sandra Lynch dissented from denial of rehearing on the grounds that, even apart from the physical injury, the rape qualified as "serious bodily injury" because "the victim suffered 'protracted loss or impairment of a . . . mental faculty'" – an "extreme psychological injury." *United States v. Rivera*, No. 95-2186, 1996 WL 338379, at *4 (1st Cir. Aug. 1, 1996) (Lynch, J., dissenting from denial of rehearing) (quoting 18 U.S.C. § 1365(g)(3)(D)). This history confirms the need to apply a broad definition to "bodily" harm in the carjacking context.

Finally, the interpretative canon against absurd constructions makes clear that "bodily harm" in the carjacking-by-intimidation case law must have the same, broad definition as "bodily injury" in Section 1365. It would be exceedingly strange for an aggravated carjacking – as defined in subsection (2) of the carjacking statute – to allow for mental-only injuries if the base-level carjacking – as defined by the "intimidation" clause – did not allow for mental-only injuries. Yet, that upside-down result would occur if the threat of "bodily harm" necessary for carjacking "by intimidation" was limited to physical harm.

In the end, the text and the interpretative canons demonstrate that carjacking "by intimidation" must include carjacking by threats of mental injury, not just by threats of physical injury.

3. Carjacking is not categorically a crime of violence because of the overbreadth in the definition of bodily harm.

In comparing the carjacking statute with section 924(c), "the overbreadth" of the carjacking statute is "evident from its text." Therefore, carjacking is not categorically a crime of violence. *United States v. Fitzgerald*, 935 F.3d 814, 818 (9th Cir. 2019) (internal quotations omitted); *see Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) ("There are two ways to show 'a realistic probability' that a state statute exceeds the generic definition. First, there is not a categorical match if a state statute expressly defines a crime more broadly than the generic offense. *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018). As long as the application of the statute's express text in the nongeneric manner is not a logical

impossibility, the relative likelihood of application to nongeneric conduct is immaterial.")

Carjacking punishes the infliction or threatened infliction of "mental" injury, while section 924(c) requires force, or threats of force, "capable of causing physical pain or injury," *Johnson*, 559 U.S. at 140. A defendant can commit a carjacking by threat of impairing the function of a "mental faculty," by means of a threat that would cause extreme emotional distress, e.g., threatening to reveal a child's true paternity, to publish nude photographs, etc. But such a threat cannot qualify as a threat of "physical force" under section 924(c). The result of this overbreadth is that carjacking is not categorically a crime of violence under section 924(c).

B. Carjacking "by intimidation" can be committed without threat of "bodily harm."

Even apart from the argument above, this Court should hold that carjacking is not a crime of violence because it can occur without any threat of bodily harm in the first place. For example, a defendant who impersonates a police officer could commit carjacking by intimidation without making any physical threat. In such a case, a victim would turn over control of the car because of fear of the legal (or reputational) harm that occurs from disobeying a police officer. This would amount to the taking of a vehicle by intimidation, yet there would be no threat – explicit or implicit – of physical harm.

This police-impersonation scenario is illustrated by actual cases. *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 (3rd Cir. 2016) ("Green and an unidentified accomplice carried out an armed carjacking while impersonating police officers."); *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"). Although the defendants in these cases did, in fact, end up using physical force to carry out the carjackings, these citations show that carjacking by impersonating an officer does 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).

Although there are cases holding that "intimidation" requires a threat of "bodily harm," these cases have not grappled with the key question in Candia's case: Can a threat of non-bodily harm be sufficiently intimidating to satisfy the carjacking statute? The reason these cases have not addressed this question is largely a function of the procedural posture in which they arrive. The categorical approach decisions, like *Gutierrez*, look to sufficiency-of-the-evidence challenges to understand what is entailed in a conviction. In the sufficiency challenges, the defendants have no reason to dispute that intimidation requires a threat of bodily harm; instead, the defendants argue that whatever acts they committed should not be construed as threats of bodily harm.

To repeat, these defendants do not make Candia's argument that non-bodily harm can be sufficient for intimidation. Rather, they argue that their conduct was not sufficient to amount to bodily harm. This is an important distinction because

the courts adjudicating these appeals have had no reason to decide whether a non-bodily-threat is sufficient to support a conviction. All that these decisions have done is apply the highly deferential standard of review required by sufficiency challenges – "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) – and conclude that some juror could have construed the defendant's conduct as a threat of bodily harm. The question of whether a jury could have convicted based on threats of legal or reputational harm is, thus, not present in these decisions.

This dynamic is illustrated by *Gutierrez* and the cases it relied upon for its holding that "intimidation" requires a threat of "bodily harm." *Gutierrez* turns to *Selfa*, 918 F.2d at 751, for the proposition that intimidation requires a threat of bodily harm. *Selfa*, which was a categorical approach decision about bank robbery, relied on *United States v. Hopkins*, 703 F.2d 1102 (9th Cir. 1983), a sufficiency-of-the-evidence challenge to a bank robbery conviction. And *Hopkins* pointed to *United States v. Bingham*, 628 F.2d 548, 548-49 (9th Cir. 1980), another bank robbery sufficiency-of-the- evidence challenge, to establish that intimidation required a threat of bodily harm. For that proposition, *Bingham*, in turn, relied on *United States v. Alsop*, 479 F.2d 65, 66 (9th Cir. 1973), a bank robbery conviction challenging the fear-of-bodily-harm jury instruction on the grounds that it should require proof of actual fear. The key point to see, in tracing back the lineage of these decisions, is that all these defendants did something short of an explicit threat of bodily harm. Yet, the reviewing courts were willing to uphold the convictions

because they found that some juror could have concluded the conduct implied a threat of bodily harm.[2] But none of these decisions touched the question, so critical to Candia's case, of whether a defendant could commit "intimidation" through forms of legal, reputational, or other non-bodily harm.

The police-impersonation examples cited above demonstrate that threats of legal and reputational harm can be intimidating enough to sustain a carjacking conviction and that this method of committing a carjacking is "more than the application of legal imagination." *Duenas-Alvarez*, 549 U.S. at 193. Because carjacking punishes intimidation that does not involve bodily harm, carjacking necessarily sweeps more broadly than the crime-of-violence definition. This argument was not presented in *Gutierrez*, and the Ninth Circuit nevertheless refused to address it in this appeal when it summarily affirmed based on *Gutierrez*.

C. Because carjacking can be committed without the intentional use or threatened use of violent physical force, it is not categorically a crime of violence.

A final basis for concluding that carjacking is not a crime of violence focuses on the *mens rea*. Carjacking by intimidation can occur without an intent to intimidate the victim. Yet, as this Court held in *Leocal v. Ashcroft*, 543 U.S. 1, 9-13 (2004), an offense cannot qualify a crime of violence if it has *mens rea* of negligence. And

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[2] The Seventh Circuit's decision in *United States v. Thornton* collects cases in which bank robbers made demands for money, but did not explicitly threaten harm. 539 F.3d 741, 748-49 (7th Cir. 2008). Court in those cases found the threat of harm to be implied because, for example, "[t]he tellers understood that the demands were not mere requests which could be ignored, but rather, felt compelled to comply." *Id.* *See also United States v. Kelley*, 412 F.3d 1240, 1243 (11th Cir. 2005); *United States v. Ketchum*, 550 F.3d 363, 368 (4th Cir. 2008).

numerous courts of appeals, including the Ninth Circuit, have relied on *Leocal* to hold that a *mens rea* of recklessness is likewise insufficient, and that only intentional conduct satisfies the federal definition for a "crime of violence." *See, e.g., United States v. Orona*, 923 F.3d 1197, 1202 (9th Cir.), *reh'g en banc granted*, 942 F.3d 1159 (9th Cir. 2019). Other circuits have held that a *mens rea* of recklessness is sufficient. *See id.* (collecting cases). This Court will address this issue soon in *Borden v. United States*, No. 19-5410.

But if intentional conduct is required to qualify as a crime of violence, then the carjacking statute does not meet this standard. Specifically, the carjacking statute does not require an *intentional* threat of force. Cases interpreting the term "intimidation" in the federal bank robbery statute, 18 U.S.C. § 2113(a), have shown that "[t]he determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions . . . . To take, or attempt to take, 'by intimidation' means willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *Alsop*, 479 F.2d at n.4. Whether the defendant "specifically intended to intimidate . . . is irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993); *see also United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) ("The intimidation element of § 2113(a) is satisfied if 'an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts,' whether or not the defendant actually intended the intimidation."). Thus, a defendant may be convicted of federal carjacking even though he did not intend to put another in fear, but merely did something that would put an ordinary, reasonable person in fear of

bodily harm. For this reason, carjacking cannot be a crime of violence under the elements clause, because the elements clause requires the intentional use or threatened use of force.

Further, the fact that carjacking requires "the intent to cause death or serious bodily harm" does not mean that the statute necessarily requires the intentional threat of physical force. This Court clarified in *Holloway v. United States* that this "intent" requirement is merely conditional, i.e., an intent to cause injury "*if* that action had been necessary to complete the taking of the car." 526 U.S. 11-12 (1999) (emphasis added). *See In re Smith*, 829 F.3d 1276, 1283-84 (11th Cir. 2016) (Pryor, J., dissenting) ("[I]t is possible to prove that a defendant had the intent to commit death or serious bodily harm without proving that he used, attempted to use, or threatened to use physical force against the victim. As the Supreme Court explained in *Holloway*, a defendant could still be found guilty of carjacking in a 'case in which the driver surrendered or otherwise lost control over his car' without the defendant ever using, attempting to use, or threatening to use physical force so long as the government could separately satisfy the intent element."). Accordingly, federal carjacking also fails to qualify as a crime of violence because it lacks the requisite intentional *mens rea*.

CONCLUSION

For the foregoing reasons, the petitioner respectfully asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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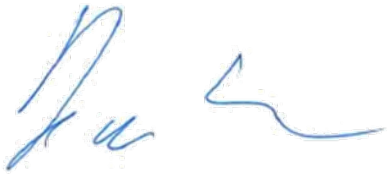
October 1, 2020



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