No. 20-6840

IN THE SUPREME COURT OF THE UNITED STATES

FREDERICK D. DARRINGTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

DANIEL J. KANE
Attorney

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

QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that carjacking, in violation of 18 U.S.C. 2119, does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. Collins, No. 07-cr-193 (May 7, 2009)

Darrington v. United States, No. 20-cv-490 (Aug. 20, 2020)

United States Court of Appeals (8th Cir.):

United States v. Darrington, No. 11-3651 (Jan. 30, 2012)

Darrington v. United States, No. 20-2831 (Dec. 15, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-6840

FREDERICK D. DARRINGTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals denying petitioner's application for a certificate of appealability (Pet. App. B1) is unreported. The order of the district court denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255 and declining to issue a certificate of appealability (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2020. The petition for a writ of certiorari was filed on

January 7, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted on two counts of carjacking, in violation of 18 U.S.C. 2119, and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Am. Judgment 1. The district court sentenced petitioner to 300 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. In 2020, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255 in which he argued that his Section 924(c) conviction should be vacated. 20-cv-490 D. Ct. Doc. 2 (June 16, 2020) (2255 Motion). The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. A1-A3. The court of appeals likewise denied a COA. Id. at B1.

1. During the spring of 2007, petitioner committed a series of armed carjackings in Kansas City, Missouri. See Presentence Investigation Report (PSR) ¶¶ 11-16. On April 9, 2007, a victim sitting in his 2007 Dodge Charger outside a blues club was carjacked by Demarko Collins and another man. PSR ¶ 11. Collins entered the passenger's seat, and his accomplice entered the rear seat on the driver's side. Ibid. The carjacker in the rear seat pointed a gun at the victim, while Collins told him "[d]on't run" and "[d]on't make me kill you." PSR ¶ 12. After demanding that

the driver empty his pockets, the perpetrators took the victim's cell phone, driver's license, debit cards, and necklace, along with $200 in cash. Ibid. The victim fled, and the perpetrators drove away in the stolen car. Ibid. Police located the stolen Dodge Charger later that day in a residential driveway, and they arrested petitioner and Collins, who were sitting on the porch adjoining that driveway. PSR ¶ 13. Collins had the keys to the Dodge Charger in his pocket at the time of his arrest, and petitioner was wearing the victim's necklace. Ibid.

On April 29, 2007, petitioner stole another 2007 Dodge Charger from a victim who had rented it for a prom. PSR ¶ 14. Acting alone this time, petitioner entered the front passenger seat of the car while it was stopped at a gas station. Ibid. Petitioner pointed a handgun at the victim and ordered him to drive to a specific intersection. Ibid. When they got there, petitioner ordered the driver to hand over his watch, earrings, and money, and told him to run away. Ibid. Petitioner then drove off with the car. Ibid.

On May 19, 2007, petitioner approached an occupied 1999 Jeep Cherokee in a parking lot. Plea Agreement 2-3; PSR ¶ 16. After asking the driver and his passenger for directions, petitioner pointed a gun at the driver, entered the back seat, and ordered the driver to drive to an ATM. PSR ¶ 16. After the driver withdrew $800, petitioner took the money and ordered the driver to drive to

another intersection. Ibid. Once there, petitioner exited the car and fled. Ibid.

On June 5, 2007, a police officer spotted petitioner driving a 1992 Chevrolet Camaro that had been reported stolen. Plea Agreement 3; PSR ¶ 55. Petitioner led the officer on a chase until his car became disabled. Ibid. Petitioner then exited the car and fired multiple rounds at the officer with a semi-automatic pistol, striking the officer in the leg. Ibid. Petitioner fled, and police officers later discovered him hiding beneath a car in a nearby garage. Ibid.

2. A federal grand jury in the Western District of Missouri charged petitioner with three counts of carjacking, in violation of 18 U.S.C. 2119, and three counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Superseding Indictment 1-4. Petitioner pleaded guilty pursuant to a plea agreement to two counts of carjacking, based on the offenses on April 29 and May 19, and one count of using a firearm during and in relation to a crime of violence, based on the April 29 carjacking. Am. Judgment 1. In the plea agreement, the parties agreed pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) that petitioner should be sentenced to 300 months of imprisonment. Plea Agreement 1, 4-5. Petitioner further agreed to waive his right to "appeal or collaterally attack a finding of guilt following the acceptance of th[e] plea agreement." Id. at 11. The district court accepted the plea agreement and

sentenced petitioner to 300 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 2-3. Petitioner did not appeal.

Petitioner later moved pro se for relief from judgment under Federal Rule of Civil Procedure 60(b). See 07-cr-193 D. Ct. Doc. 151 (July 21, 2011). The district court denied that motion, 07-cr-193 D. Ct. Doc. 154 (Dec. 2, 2011), and the court of appeals affirmed, 11-3651 Judgment (Jan. 30, 2012).

3. In 2020, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued that his Section 924(c) conviction should be vacated on the theory that carjacking in violation of Section 2119 is not a crime of violence under Section 924(c)(3). 2255 Motion. Section 924(c)(3) defines a "crime of violence" as a felony offense 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, "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). In 2019, this Court held in United States v. Davis, 139 S. Ct. 2319, that the latter alternative definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336. Petitioner argued that, after Davis, carjacking is not a crime of violence under Section 924(c)(3)(B), and does not qualify as a crime of violence under Section 924(c)(3)(A). 2255 Motion 2-6.

The district court denied petitioner's motion and declined to issue a COA. Pet. App. A1-A3. The court observed that the court of appeals, like several other circuit courts, had recognized "that carjacking continues to be a crime of violence under [Section 924(c)(3)(A)] post-Davis." Id. at A2 (citing, inter alia, Taylor v. United States, 773 Fed. Appx. 346, 347 (8th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 516 (2019)). The district court also declined to issue a COA, finding that no reasonable jurist would grant petitioner's motion. Id. at A3. The court of appeals likewise denied petitioner a COA. Id. at B1.

ARGUMENT

Petitioner contends (Pet. 4-18) that the court of appeals erred in denying his request for a COA on his claim that carjacking does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A). That contention lacks merit. As petitioner acknowledges (Pet. 15), every court of appeals to have considered the question has recognized that carjacking under 18 U.S.C. 2119 is a "crime of violence" under 18 U.S.C. 924(c)(3)(A). This Court has recently and repeatedly denied petitions for a writ of certiorari seeking review of that issue, as well as a similar issue under the federal bank-robbery statute. And this case would be an unsuitable vehicle for considering the question presented in any event, because petitioner waived any challenge to his Section 924(c) conviction as part of his plea agreement. The petition for a writ of certiorari should be denied.

1. A federal prisoner seeking to appeal the denial of a motion for postconviction relief under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); see Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (same).

a. The court of appeals correctly declined to issue a COA on petitioner's claim that carjacking in violation of 18 U.S.C. 2119 does not qualify as a crime of violence under Section 924(c)(3)(A). Section 924(c)(3)(A) encompasses federal felonies that "ha[ve] 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). And 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.

Every court of appeals that has considered the question has determined that federal carjacking qualifies as a "crime of violence" under Section 924(c)(3)(A). See United States v. Felder, No. 19-897, 2021 WL 1201340, at *15 (2d Cir. Mar. 31, 2021); United

States v. Lowe, No. 20-1311, 2020 WL 4582606 (3d Cir. July 9, 2020); Estell v. United States, 924 F.3d 1291, 1293 (8th Cir.), cert. denied, 140 S. Ct. 490 (2019); United States v. Jackson, 918 F.3d 467, 484-486 (6th Cir. 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. Kundo, 743 Fed. Appx. 201 (10th Cir. 2018); United States v. Gutierrez, 876 F.3d 1254 (9th Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 1602 (2018); United States v. Jones, 854 F.3d 737, 740 (5th Cir.), cert. denied, 138 S. Ct. 242 (2017), abrogated on other grounds by Davis, 139 S. Ct. 2319; United States v. Evans, 848 F.3d 242, 244 (4th Cir.), cert. denied, 137 S. Ct. 2253 (2017); In re Smith, 829 F.3d 1276, 1280-1281 (11th Cir. 2016). 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").

This Court has recently and repeatedly denied petitions for a writ of certiorari seeking review of whether carjacking qualifies as a crime of violence under Section 924(c)(3)(A).[1] The Court has also consistently denied petitions raising a related issue under the federal bank robbery statute, 18 U.S.C. 2113, which has operative language similar to the carjacking statute. See 18 U.S.C. 2113(a) (a defendant commits bank robbery by taking property from a bank by "force and violence, or * * * intimidation"); Jones, 854 F.3d at 740-741 (noting similarities between carjacking and bank robbery statutes); Evans, 848 F.3d at 246-247 (same); Pet. 4-5 (likening petitioner's challenge to his carjacking offense under Section 924(c)(3)(A) to other challenges to bank-robbery offenses).[2] Every court of appeals to have

---

[1] See, e.g., Taylor v. United States, 140 S. Ct. 516 (2019) (No. 19-6238); 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); Johnson v. United States, 139 S. Ct. 70 (2018) (No. 17-8632); Horne v. United States, 139 S. Ct. 208 (2018) (No. 18-5061); 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).

[2] See also, e.g., Williams v. United States, 141 S. Ct. 102 (2020) (No. 18-6172) (armed bank robbery); Lacy v. United States, 140 S. Ct. 2627 (2020) (No. 19-6832) (same); Hanks v. United States, 140 S. Ct. 2584 (2020) (No. 19-7732) (bank robbery);

considered the issue has concluded that bank robbery, like carjacking, "inherently contains a threat of violent physical force" and thus qualifies as a "crime of violence" under Section 924(c)(3)(A). United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016); see Wingate v. United States, 969 F.3d 251, 263-264 (6th Cir. 2020); United States v. Reece, 938 F.3d 630, 636 (5th Cir. 2019); Estell, 924 F.3d at 1293; United States v. Hendricks, 921 F.3d 320, 327-328 (2d Cir. 2019), cert. denied, 140 S. Ct. 870 (2020); United States v. Rinker, 746 Fed. Appx. 769, 770-771 (10th Cir. 2018); United States v. Johnson, 899 F.3d 191, 203-204 (3d Cir.), cert. denied, 139 S. Ct. 647 (2018); United States v. Watson, 881 F.3d 782, 784-786 (9th Cir.) (per curiam), cert. denied, 139 S. Ct. 203 (2018); Hunter v. United States, 873 F.3d 388, 390 (1st Cir. 2017); In re Sams, 830 F.3d 1234, 1239 (11th

---

Hunter v. United States, 140 S. Ct. 983 (2019) (No. 19-6686) (armed bank robbery); Mojica v. United States, 140 S. Ct. 911 (2020) (No. 19-35) (same); Gould v. United States, 140 S. Ct. 561 (2019) (No. 18-9793) (same); Myrie v. United States, 140 S. Ct. 452 (2019) (No. 19-5392) (same); Cirino v. United States, 139 S. Ct. 2012 (2019) (No. 18-7680) (same); Hearn v. United States, 139 S. Ct. 1620 (2019) (No. 18-7573) (same); Landingham v. United States, 139 S. Ct. 1620 (2019) (No. 18-7543) (same); Estell, supra (No. 19-6131) (bank robbery); Pastor v. United States, 140 S. Ct. 412 (2019) (No. 19-5812) (same); Mitchell v. United States, 140 S. Ct. 285 (2019) (No. 19-5070) (same); Watson v. United States, 140 S. Ct. 171 (2019) (No. 18-9469) (armed bank robbery); Karahalios v. United States, 140 S. Ct. 73 (2019) (No. 19-5107) (bank robbery); Cadena v. United States, 139 S. Ct. 436 (2018) (No. 18-6069) (same); Patterson v. United States, 139 S. Ct. 291 (2018) (No. 18-5685) (same); Watson v. United States, 139 S. Ct. 203 (2018) (No. 18-5022) (armed bank robbery); Schneider v. United States, 138 S. Ct. 638 (2018) (No. 17-5477) (bank robbery); Castillo v. United States, 138 S. Ct. 638 (2018) (No. 17-5471) (same).

Cir. 2016) (per curiam); United States v. McNeal, 818 F.3d 141, 153 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016); see ibid. ("Our sister circuits have uniformly ruled that other federal crimes involving takings 'by force and violence, or by intimidation,' have as an element the use, attempted use, or threatened use of physical force."); see also United States v. Carr, 946 F.3d 598, 601-604 (D.C. Cir. 2020) (holding that bank robbery qualifies as a crime of violence under a similar provision in Sentencing Guidelines § 4B1.2(a)(1)).

b. Petitioner contends (Pet. 6-12) that carjacking is not a crime of violence under Section 924(c)(3)(A) because it may be accomplished by "intimidation," 18 U.S.C. 2119. He observes (Pet. 10-11) that this Court in Leocal v. Ashcroft, 543 U.S. 1 (2004), interpreted the definition of "crime of violence" in 18 U.S.C. 16(a), which is nearly identical to the definition in Section 924(c)(3), to exclude "negligent or merely accidental conduct." 543 U.S. at 9. And he argues that carjacking, like bank robbery, can be accomplished by "merely accidental or negligent conduct." Pet. 10 (quoting Leocal, 543 U.S. at 11).

Petitioner's reliance on Leocal is misplaced. As an initial matter, Leocal addressed whether a prior conviction for driving under the influence of alcohol included as an element the "use" of force where the statute of conviction did not contain a mens rea requirement. 543 U.S. at 7-9. Although the Court held that the "use" of force for purposes of Section 16(a) must entail "a higher

degree of intent than negligent or merely accidental conduct," it expressly declined to consider whether the same limitation applies, as petitioner suggests (Pet. 8), to the "threatened use of force." 543 U.S. at 8-9.

In any event, Section 2119 does not criminalize the kind of negligent or accidental conduct that was potentially encompassed by the statute at issue in Leocal. A conviction for carjacking requires proof of "intent to cause death or serious bodily harm." 18 U.S.C. 2119. Section 2119 thus requires "pro[of] that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car)." Holloway, 526 U.S. at 12. Although carjacking can be committed by "intimidation," a defendant may be convicted only if "the intimidating act was conducted 'with the intent to cause death or serious bodily harm.'" Ovalles v. United States, 905 F.3d 1300, 1303 (11th Cir. 2018) (per curiam) (quoting 18 U.S.C. 2119), cert. denied, 139 S. Ct. 2716 (2019); see Holloway, 526 U.S. at 11 ("While an empty threat, or intimidating bluff, would be sufficient to satisfy the ['intimidation'] element, such conduct, standing on its own, is not enough to satisfy § 2119's specific intent element.").[3]

[3] Petitioner suggests in a footnote that the "conditional intent" described in Holloway "cannot satisfy [Section 924(c)(3)(A)] based on Leocal because it is far too abstract." Pet. 11 n.5 (citing Holloway, 526 U.S. at 12-22 (Scalia, J., dissenting)). Petitioner fails to meaningfully develop this

Moreover, even if Section 2119 did not contain that specific-intent element, it still would not criminalize merely accidental or negligent conduct, and petitioner's contention (Pet. 6-12) that the similarly worded federal bank-robbery statute is not a crime of violence lacks merit. A defendant cannot be convicted of bank robbery under Section 2113(a) or carjacking under Section 2119 unless he knowingly or purposely uses force or the threat of force to obtain property. See Carter v. United States, 530 U.S. 255, 268 (2000). Although intimidation is defined "at least partly in objective terms of what a reasonable, ordinary person would find intimidating," the defendant must also know that his actions would be so perceived, "which separates this offense from crimes of mere negligence." Carr, 946 F.3d at 606; United States v. McCranie, 889 F.3d 677, 680 (10th Cir. 2018) (bank robbery by intimidation "requires a purposeful act that instills objectively reasonable fear (or expectation) of force or bodily injury"), cert. denied, 139 S. Ct. 1260 (2019); McNeal, 818 F.3d at 155 ("[T]o secure a conviction of bank robbery 'by intimidation,' the government must prove not only that the accused knowingly took property, but also that he knew that his actions were objectively intimidating."); cf. United States v. Bailey, 444 U.S. 394, 404 (1980) (explaining

---

argument. In any event, as Holloway explained, "conditional" and "unconditional" intent are both "species of wrongful intent," and "'[a]n intent to kill, in the alternative, is nevertheless an intent to kill.'" 526 U.S. at 9, 11 (majority opinion) (brackets in original) (quoting R. Perkins & R. Boyce, Criminal Law 647 (3d ed. 1982)).

that the culpable mental state of knowledge requires awareness in the defendant that a result "is practically certain to follow from his conduct, whatever his desire may be as to that result") (citation omitted). And as the courts of appeals have uniformly recognized, a defendant who "knowingly rob[s] or attempt[s] to rob a bank" by engaging in conduct that he knows "'would create the impression in an ordinary person that resistance would be met by force'" is properly described as having committed a threatened use of physical force within the meaning of Section 924(c)(3)(A) and similar provisions. United States v. Wilson, 880 F.3d 80, 87 n.8 (3d Cir.) (quoting United States v. McBride, 826 F.3d 293, 295-296 (6th Cir. 2016), cert. denied, 137 S. Ct. 830 (2017)), cert. denied, 138 S. Ct. 2586 (2018).

c. None of the cases on which petitioner relies (Pet. 8-10) supports his assertion that a defendant can negligently or accidentally commit carjacking. Petitioner cites cases from the Fourth, Eighth, Ninth, and Eleventh Circuits involving bank robbery, but those decisions merely illustrate the same principle that this Court recognized in Carter: Section 2113(a) does not require proof of a "specific[ ] intent[ ] to intimidate" -- knowledge that the defendant's actions will be perceived to threaten violence suffices. United States v. Foppe, 993 F.2d 1444, 1451 (9th Cir.), cert. denied, 510 U.S. 1017 (1993); United States v. Kelley, 412 F.3d 1240, 1244 (11th Cir.), cert. denied, 546 U.S. 925 (2005); United States v. Yockel, 320 F.3d 818, 824 (8th Cir.),

cert. denied, 540 U.S. 839 (2003); United States v. Woodrup, 86 F.3d 359, 364 (4th Cir.), cert. denied, 519 U.S. 944 (1996). Each of those courts has subsequently explained that, because the bank-robbery statute requires at least a mens rea of knowledge, the lack of a specific-intent requirement does not mean that "a defendant may * * * be convicted if he only negligently intimidated the victim." Watson, 881 F.3d at 785 (emphasis added); accord Estell, 924 F.3d at 1293 (citing Yockel); United States v. Horsting, 678 Fed. Appx. 947, 950 (11th Cir. 2017) (per curiam) (citing Kelley); McNeal, 818 F.3d at 155 (citing Woodrup). And in any event, as explained above, carjacking, unlike bank robbery, requires the specific intent to cause death or serious bodily harm.

d. This Court recently heard oral argument in Borden v. United States, No. 19-5410 (Nov. 3, 2020), which presents the question whether the "use * * * of physical force" in the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i), includes reckless conduct. Petitioner acknowledges (Pet. 6 n.2) that "[t]he outcome of Borden is unlikely to impact the question presented," and in fact it will not. Carjacking cannot be committed recklessly for the same reasons that it cannot be committed negligently. See Estell, 924 F.3d at 1293 (rejecting argument that "the 'intimidation' element in the bank robbery statute may be met through a defendant's reckless or negligent conduct" and concluding that "[t]he same goes for carjacking by intimidation"); United States v. Bailey, 819 F.3d

92, 97-98 (4th Cir. 2016) (vacating carjacking conviction where the evidence established only "generalized recklessness and desperation" rather than "specific intent, conditional or otherwise"). Accordingly, regardless of how this Court resolves the question presented in Borden, that decision will not affect the judgment in this case.

2. Even if the question presented warranted further review, this case would be an unsuitable vehicle for considering it. As explained above, petitioner entered into a plea agreement in which he waived his right to challenge his Section 924(c) conviction on collateral review. Plea Agreement 11. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See, e.g., Garza v. Idaho, 139 S. Ct. 738, 744-745 (2019) (waiver of right to appeal); Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389, 398 (1987) (waiver of right to file constitutional tort action).

Although the government did not invoke that waiver in the district court, and the court of appeals denied petitioner's request for a COA without requesting a response from the government, that disposition does not foreclose the government from relying on petitioner's waiver in this Court. See, e.g., United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977) ("[A] prevailing party may defend a judgment on any ground which

the law and the record permit that would not expand the relief it has been granted."). And doing so would be particularly appropriate here. Petitioner secured substantial benefits by pleading guilty and waiving his right to challenge his convictions on appeal or postconviction review, including dismissal of two additional Section 924(c) counts and one additional carjacking count that had been charged in the superseding indictment. Plea Agreement 5-6; see Superseding Indictment 2-4. Under these circumstances, petitioner cannot demonstrate any unfairness in holding him to his agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

DANIEL J. KANE
Attorney

APRIL 2021