No.

In The Supreme Court Of The United States

John Devencenzi,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented for Review

By its plain language, federal carjacking can be committed by "intimidation." 18 U.S.C. § 2119. This Court recognizes carjacking by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). Thus, a defendant could be found guilty of carjacking by intimidation in a "case in which the driver surrendered or otherwise lost control over his car" without the defendant ever using, attempting to use, or threatening to use physical force. *Id.* While the government must prove 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," the statute does not require the outward threat of such harm to obtain a carjacking conviction. *Id.*

In the crime of violence context, have the Circuits interpreted the actus reus of federal carjacking too narrowly by providing the threat of violent physical force constitutes an element of the offense?

Related Proceedings

Petitioner John Devencenzi moved to vacate his 18 U.S.C. § 924(c) conviction under 28 U.S.C. § 2255 in the District of Nevada. The district court denied the motion to vacate and a certificate of appealability in *United States v. Devencenzi*, 3:11-cr-00095-LRH-CLB-1, 2020 WL 7427524 (D. Nev. Dec. 18, 2020) (unpublished). App. B. The Ninth Circuit denied a certificate of appealability in *United States v. Devencenzi*, 21-15272 (9th Cir. June 17, 2021) (unpublished). App. A.

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United States Constitution

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Petition for Certiorari

Petitioner John Devencenzi 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 Court of Appeals order denying a certificate of appealability is not published in the Federal Reporter. App. A. The district court's order denying the motion to vacate and certificate of appealability is unreported but reprinted at *United States v. Devencenzi*, 3:11-cr-00095-LRH-CLB-1, 2020 WL 7427524 (D. Nev. Dec. 18, 2020) (unpublished). App. B.

Jurisdiction

The Ninth Circuit denied a certificate of appealability on June 17, 2021. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely per Supreme Court Rule 13.1.

Constitutional and Statutory Provisions Involved

1. U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. Title 18, Section 924(c), of the United States Code provides in relevant part:

> (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.

3. The federal carjacking statute, 18 U.S.C. § 2119, provides:

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.

4. The statutory definitions of "serious bodily injury" and "bodily injury," 18 U.S.C. § 1365, are:

As used in this section--

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

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

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

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

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

(B) physical pain;

(C) illness;

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

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

Statement of the Case

Petitioner Devencenzi is just one of the many defendants convicted and sentenced to a mandatory minimum sentence under 18 U.S.C. § 924(c) where the predicate offense no longer qualifies as a crime of violence. Section 924(c) provides graduated, mandatory, consecutive sentences for using a firearm during and in relation to a crime of violence. Devencenzi was sentenced to 25 years in prison, with 10 years of this term attributable solely to the mandatory sentencing scheme under 18 U.S.C. § 924(c).

In 2012, Devencenzi pled guilty to using a firearm during "a crime of violence"—specifically, federal carjacking—under 18 U.S.C. § 924(c)(1)(A) (Count Two) and prohibited person in possession of a firearm under 18 U.S.C. §§ 922(g) and 924(a) (Count Three). The district court sentenced Devencenzi to 15 years of imprisonment on Count Three and a consecutive sentence of 10 years of imprisonment on Count Two.

In 2015, this Court held the Due Process Clause precluded imposing an increased sentence under the residual clause of the Armed Career Criminal Act's ("ACCA") violent felony definition. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court later issued *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016), holding *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. In June 2019, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), holding the residual clause of 18 U.S.C. § 924(c)(3)(B) violates the Constitution's guarantee of due process.

Devencenzi sought relief from his § 924(c) conviction by filing a timely motion to vacate under 28 U.S.C. § 2255 in the District of Nevada. He raised a claim under *Davis*, arguing federal carjacking no longer qualifies as crimes of violence. The district court denied the motion on the merits and denied a certificate of appealability. App. B.

Devencenzi timely appealed and requested a certificate of appealability. The Ninth Circuit summarily denied that request based on its precedent holding carjacking is a crime of violence under the § 924(c)(3)(A) physical force clause. App. A (citing *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017)).

Reasons for Granting the Petition

The Court should instruct the Circuits on the proper interpretation of the federal carjacking statute, 18 U.S.C. § 2119. The current federal circuit consensus that carjacking necessarily requires the use, attempted use, or threatened use of violent physical force conflicts with the plain language of § 2119. To make the carjacking statute "fit" the 18 U.S.C. § 924(c)(3)(A) physical force clause definition of crime of violence, the Circuits have attempted to judicially narrow the conduct that the carjacking statute actually covers. It is imperative this Court properly interpret the federal carjacking statute, so defendants are not mandatorily incarcerated for firearms offenses that do not legally meet the § 924(c) statutory crime-of-violence definition.

I. This Court retroactively invalidated the § 924(c) residual clause, leaving the physical force clause as the only way by which an offense can qualify as a § 924(c) crime of violence.

In *Davis*, 139 S. Ct. 2319, this Court struck 18 U.S.C. § 924(c)'s residual clause as vague and in violation of the Due Process Clause. U.S. Const. amend. V. Devencenzi expects the government will concede, as it has done here and elsewhere, that *Davis* pronounced a substantive rule applying retroactively to motions to vacate brought under 28 U.S.C. § 2255. Brief for the United States, *United States v. Davis*, S. Ct. No. 18-431, p. 52 (Feb. 12, 2019) ("A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review.") (citing *Welch*, 136 S. Ct. at 1267).[1]

Therefore, to qualify as a § 924(c) predicate crime of violence, an offense must meet the physical force clause of the crime of violence definition at § 924(c)(3)(A). The offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). This means the offense must necessarily require two elements. First, violent physical force capable of causing physical pain or injury to another person or property. *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v.*

[1] Every circuit to address this question in a published opinion agrees *Davis* applies retroactively. *See King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020); *In re Thomas*, 988 F.3d 783, 788-89 (4th Cir. 2021); *In re Franklin*, 950 F.3d 909, 910-11 (6th Cir. 2019); *Cross v. United States*, 892 F.3d 288, 294-94 (7th Cir. 2018); *United States v. Bowen*, 936 F.3d 1091, 1100 (10th Cir. 2019); *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019).

United States, 559 U.S. 133, 140 (2010)). Second, the use of force must be intentional and not merely reckless or negligent. *Borden v. United States*, 141 S. Ct. 1817, 1834 (2021); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

II. Carjacking by intimidation does not require the use, attempted use, or threatened use of violent physical force.

Carjacking is overbroad and does not qualify under the physical force clause for three reasons. First, the carjacking statute, as interpreted by this Court, does not require proof of an outward threat for conviction. Second, "intimidation" includes non-corporeal harm. Third, when reviewing carjacking convictions for sufficient evidence, the Circuits interpret intimidation broadly to encompass conduct that does not include the use, attempted use, or threatened use of force. This Court must resolve this dispute over the proper interpretation and scope of the carjacking statute.

A. This Court holds that the carjacking statute does not require proof of an outward threat for conviction.

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

This Court recognizes carjacking by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). *Holloway* addressed the intent necessary for carjacking, and ruled that a defendant could be found guilty of carjacking by intimidation in a "case in which the driver surrendered or otherwise lost control over his car" without the defendant ever using, attempting to use, or threatening to use physical force. *Id.* This Court

concluded that while to obtain a § 2119 conviction the government must "prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car," the statute does not require the threat of such harm to obtain a carjacking conviction. *Id.* In another context, when defining threat, this Court recognized that a victim's reasonable fear of "bodily" harm does not prove that a defendant communicated an intent to inflict harm. *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015).

Under this Court's precedent, the carjacking statute does not require a threat of force, let alone its use or attempted use. *See also United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) (a threat of physical force "requires some outward expression or indication of an intention to inflict pain, harm or punishment."). This Court should correct the Circuits' erroneous interpretation otherwise. *See infra*, pp. 14-15.

B. "Intimidation" includes non-corporeal harm.

Textual statutory analysis also supports the broad definition of carjacking by "intimidation" to include non-corporeal harm. A threat of mental, emotional, or psychological harm will put the defendant in fear of "bodily harm" and thus constitute carjacking. The carjacking statute cross-references 18 U.S.C. § 1365 to define "bodily injury" as "serious bodily injury (as defined in section 1365 of this title . . .)." In turn, § 1365's definition includes not only traditional physical corporal harm, but also non-corporeal harm. Specifically, "bodily injury" includes the "impairment of the function of a . . . mental faculty," 18 U.S.C. § 1365(h)(4), and

"serious bodily injury" includes "bodily injury which involves . . . protracted loss or impairment of the function of a . . . mental faculty," 18 U.S.C. § 1365(h)(3).

Congress has demonstrated its ability to limit "bodily" to purely physical harm, either by not cross-referencing § 1365, or by specifically removing the mental-injury component. For example, the federal hate crime statute, at 18 U.S.C. § 249(c)(1), limits "bodily injury" to corporeal harm: "the term 'bodily injury' has the meaning given such term in section 1365(h)(4) of this title, but *does not include solely emotional or psychological* harm to the victim." 18 U.S.C. § 249(c)(1) (emphasis added); *see also* 18 U.S.C. § 113(b)(2) (assaults within maritime and territorial jurisdiction); 18 U.S.C. § 115(b)(1)(B)(iv) (influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member); 18 U.S.C. § 1347(a) (health care fraud).

But for the carjacking statute, Congress specifically cross-referenced § 1365 to define "bodily injury." This cross-reference to include a specific definition of "bodily injury" shows a deliberate legislative choice to give "bodily" a broad definition here.

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

threat—explicit or implicit—to inflict physical harm. The fear of legal consequences intimidates.

Caselaw documents this police-impersonation carjacking scenario. *See, e.g., United States v. Martinez,* 862 F.3d 223, 230, 240-41 (2d Cir. 2017) ("One of the coconspirators' main stratagems was to impersonate officers of the New York City Police Department."); *United States v. Green,* 664 Fed. App'x 193, 195 (3d Cir. 2016) ("Green and an unidentified accomplice carried out an armed carjacking while impersonating police officers."); *United States v. Vizcarrondo-Casanova*, 763 F.3d 89, 93 (1st Cir. 2014) (discussing prior bad acts evidence, including instances where co-defendants impersonated police or federal agents to commit robberies and carjackings); *United States v. Diaz*, 248 F.3d 1065, 1097 (11th Cir. 2001) ("appellants impersonated police by driving a white Chevrolet Caprice and using a blue flashing light to pull Armando Gonzalez over"); *Khneiser v. Fisher*, No. 5:16-cv-00936, 2017 WL 3394323 (C.D. Cal. Aug. 7, 2017) (affirming denial of 28 U.S.C. § 2254 challenge where defendant impersonated police officer to commit armed robbery and carjacking); *Jones v. Prelesnik*, 2:08-cv-14126, 2011 WL 1429206, *1 (E.D. Mich. Apr. 14, 2011) (same).

Although the defendants in these cases did ultimately use physical force to carry out the carjackings, these citations show that carjacking by impersonation would not *require* such force or threats of force. Intimidation in this manner—not involving force or threatened force—is, thus, "more than the application of legal imagination." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

C. Circuits interpret intimidation broadly for sufficiency of the evidence purposes, conflicting with their crime of violence rulings.

A review of "intimidation" decisions among the Circuits reveals a broad interpretation of "intimidation" for sufficiency—to sweep the widest possible range of conduct into robbery. These courts affirm robbery convictions including non-violent conduct that *does not* involve the use, attempted use, or threats of violent force:

- A teller at a bank inside a grocery store left her station to use the phone and two men laid across the bank counter to open the unlocked cash drawer, taking $961.00. *United States v. Kelley*, 412 F.3d 1240, 1243 (11th Cir. 2005). The men did not speak during the robbery. *Id.*

- A defendant gave a teller a note that read, "These people are making me do this," and told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008).

- A defendant gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983). The teller said she had no hundreds or fifties, and the defendant responded, "Okay, then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.*

- A defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers. *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982). Defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing. *Id.*

But despite this broad definition of "intimidation," the Circuits find "intimidation" must, as a matter of law, involve the use, attempted use, or threats of violent physical force for § 924(c) analysis. *Gutierrez*, 876 F.3d at 1255-57; *Estell v.*

United States, 924 F.3d 1291, 1293 (8th Cir. 2019), *cert. denied* WL 5875233 (2019); *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019); *United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1391 (2019); *Ovalles v. United States*, 905 F.3d 1300, 1304 (11th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 2716 (2019); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 242 (2017); *United States v. Evans*, 848 F.3d 242, 246-48 (4th Cir. 2017), *cert. denied*, 137 S. Ct. 2253 (2017); *United States v. Kundo*, 743 F. App'x 201, 203 (10th Cir. 2018).

The conflicting interpretations of "intimidation"—a non-violent one for sufficiency analysis and a violent one for crime-of-violence analysis—cannot stand. This Court, in *Stokeling*, reiterated that the modifier "physical" in § 924(c)(3)(A), "plainly refers to force exerted by and through concrete bodies—*distinguishing physical force, from, for example, intellectual force or emotional force*." 139 S. Ct. at 552 (quoting *Johnson*, 559 U.S. at 140) (emphasis added). While the conduct in the above examples would no doubt be emotionally or intellectually disturbing to the victims, the offenses involved no physical force or threat of physical force. Non-violent robbery by intimidation does not qualify under *Stokeling*.

***

This Court requires § 924(c) crimes of violence to involve force, or threatened force, "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. Because federal carjacking permits intimidating conduct threatening non-corporeal harm, it cannot qualify as a crime of violence after *Davis*.

III. The question herein raises an issue of exceptional importance this Court has not yet addressed, particularly given § 924(c)'s mandatory minimum sentences.

The question presented by Devencenzi is of exceptional important to federal courts and defendants given the graduated mandatory minimum sentences required by § 924(c), ranging from five years to life imprisonment. Devencenzi is just one of the thousands of defendants sentenced under § 924(c). According to the Sentencing Commission's latest statistics, approximately 21,700 individuals (14.3% of the federal prison population) are serving a § 924(c) mandatory sentence. U.S. Sent. Comm'n, *Quick Facts: Federal Offenders in Prison* (March 2021).[2]

This Court has not yet addressed whether the plain language of 18 U.S.C. § 2119 necessarily meets the § 924(c)(3)(A) physical force clause definition of a crime of violence. The Circuits' overbroad interpretations that carjacking necessarily requires violent force is akin to the uniform misinterpretation of 18 U.S.C. § 922(g), the prohibited person in possession of a firearm statute this Court corrected in 2019. *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019). The proper interpretation of the carjacking statute similarly requires this Court's review and intervention.

[2] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_March2021.pdf.

Conclusion

Devencenzi requests the Court grant this petition for a writ of certiorari.

Dated: August 3, 2021

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